

**THE
LAW OF EVIDENCE**

THE LAW OF EVIDENCE

(THE INDIAN EVIDENCE ACT)

BY

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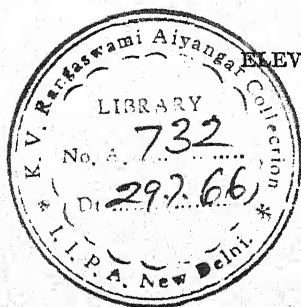
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ELEVENTH EDITION

BOMBAY:

THE BOMBAY LAW REPORTER OFFICE,

63, MARINE DRIVE,

1949.

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Printed by Dhirubhai Dalal, at the Associated Advertisers & Printers, Ltd.,
503, Arthur Road, Tardeo, Bombay 7, and
Published by Ratanlal Ranchhoddas and Dhirajlal K. Thakore,
at 63, Marine Drive, Bombay.

PREFACE TO THE ELEVENTH EDITION

THIS book has been written for students in order to enable them to understand and grasp the principles of the law of evidence.

The "Commentary" under each section is divided into two parts : Comment and Cases. In the "Comment", the object, principle, and meaning, of the provisions of the Act are carefully explained and elucidated in the light of leading Indian and English decisions.

Under the heading "Cases", the facts of important decisions have been given to illustrate the meaning of the provisions.

It may be observed that a critical study of this book will enable a student to acquire a sound knowledge of the law of evidence. Mere cramming of analytical summaries or catechisms will never help him in solving concrete problems. A complete mastery of the principles of the law of evidence is a *sine qua non* to one who seriously aspires to rise in the profession.

The "Summary" of the provisions of the Act will give to the beginner a bird's-eye view of the whole Act. To one who has mastered the subject it will be useful for revision when examination is at hand.

The "Appendix" contains questions set at various law examinations. They will enable the student to rivet his attention on portions demanding special care.

This edition has undergone a thorough and careful revision and the case law has been brought down to date.

October, 1949.

R. R.

D. K. T.

CONTENTS.

THE INDIAN EVIDENCE ACT.

PART I.—RELEVANCY OF FACTS.

		PAGES.
CHAP.	I.—PRELIMINARY (SS. 1-4)	1—12
„	II.—RELEVANCY OF FACTS (SS. 5-55)	12—131

PART II.—ON PROOF.

CHAP.	III.—FACTS WHICH NEED NOT BE PROVED (SS. 56-58)	132—135
„	IV.—ORAL EVIDENCE (SS. 59-60)	136—138
„	V.—DOCUMENTARY EVIDENCE (SS. 61-90)	138—169
„	VI.—EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE (SS. 91-100)	169—199

PART III.—PRODUCTION AND EFFECT OF EVIDENCE

CHAP.	VII.—BURDEN OF PROOF (SS. 101-114)	200—218
„	VIII.—ESTOPPEL (SS. 115-117)	228—245
„	IX.—WITNESSES (SS. 118-134)	246—267
„	X.—EXAMINATION OF WITNESSES (SS. 135-166)	267—305
„	XI.—IMPROPER ADMISSION AND REJECTION OF EVIDENCE (S. 167)	305
SUMMARY	.. .. .	308
APPENDIX	.. .. .	333
INDEX	.. .. .	343

ARRANGEMENT OF SECTIONS

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

SECTIONS.	PAGES.
1. Short title	2
Extent	2
Commencement of Act	2
2. (<i>Repealed</i>)	3
3. Interpretation-clause	3
4. "May presume"	11
"Shall presume"	11
"Conclusive proof"	11

CHAPTER II.

OF THE RELEVANCY OF FACTS.

5. Evidence may be given of facts in issue and relevant facts ..	12
6. Relevancy of facts forming part of same transaction	14
7. Facts which are the occasion, cause or effect of facts in issue ..	15
8. Motive, preparation and previous or subsequent conduct	16
9. Facts necessary to explain or introduce relevant facts	22
10. Things said or done by conspirator in reference to common design ..	23
11. When facts not otherwise relevant become relevant	26
12. In suits for damages, facts tending to enable Court to determine amount are relevant	29
13. Facts relevant when right or custom is in question	29
14. Facts showing existence of state of mind, or of body, or bodily feeling	34
15. Facts bearing on question whether act was accidental or intentional	39
16. Existence of course of business when relevant	42

SECTIONS.

PAGES.

Admissions.

17. Admission defined	43
18. Admission—	
by party to proceeding or his agent ;	44
by suitor in representative character ;	44
by party interested in subject-matter ;	44
by person from whom interest derived;	44
19. Admissions by persons whose position must be proved as against party to suit	47
20. Admissions by persons expressly referred to by party to suit ..	48
21. Proof of admissions against persons making them, and by or on their behalf	49
22. When oral admissions as to contents of documents are relevant ..	52
23. Admissions in civil cases when relevant	53
24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding	54
25. Confession to police officer not to be proved	60
26. Confession by accused while in custody of police not to be proved against him	63
27. How much of information received from accused may be proved ..	65
28. Confession made after removal of impression caused by inducement, threat or promise, relevant	72
29. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.	73
30. Consideration of proved confession affecting person making it and others jointly under trial for same offence	74
31. Admissions not conclusive proof, but may estop	83

Statements by Persons who cannot be called as Witnesses.

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant	84
When it relates to cause of death ;	84
or is made in course of business ;	84
or against interest of maker ;	84
or gives opinion as to public right or custom, or matters of general interest ;	84
or relates to existence of relationship	84
or is made in will or deed relating to family affairs ;	85
or in document relating to transaction mentioned in section 13, clause (a) ;	85
or is made by several persons and expresses feelings relevant to matter in question	85

SECTIONS.

PAGES.

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. 99

Statements made under Special Circumstances.

34. Entries in books of account when relevant 104
 35. Relevancy of entry in public record made in performance of duty 106
 36. Relevancy of statements in maps, charts and plans 108
 37. Relevancy of statements as to fact of public nature contained in certain Acts or notifications 108
 38. Relevancy of statements as to any law contained in law-books 109

How much of a Statement is to be proved.

39. What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers 109

Judgments of Courts of Justice when relevant.

40. Previous judgments relevant to bar a second suit or trial 110
 41. Relevancy of certain judgments in probate, etc., jurisdiction 111
 42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41 114
 43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant 115
 44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved 117

Opinions of third Persons when relevant.

45. Opinions of experts 120
 46. Facts bearing upon opinions of experts 122
 47. Opinion as to handwriting when relevant 123
 48. Opinion as to existence of right or custom, when relevant 124
 49. Opinion as to usages, tenets, etc., when relevant 125
 50. Opinion on relationship when relevant 126
 51. Grounds of opinion when relevant 127

Character when relevant.

52. In civil cases character to prove conduct imputed irrelevant 127
 53. In criminal cases previous good character relevant 128
 54. Previous bad character not relevant, except in reply 129
 55. Character as affecting damages 130

PART II.

ON PROOF.

XX

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

SECTIONS.

PAGES.

✓ 56.	Fact judicially noticeable need not be proved	..	..	..	132
57.	Facts of which Court must take judicial notice	..	..	..	132
58.	Facts admitted need not be proved	..	..	..	135

CHAPTER IV.

OF ORAL EVIDENCE.

59.	Proof of facts by oral evidence	..	..	..	..	136
60.	Oral evidence must be direct	..	..	..	..	136

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

61.	Proof of contents of documents	..	..	..	..	138
62.	Primary evidence	..	..	..	..	139
63.	Secondary evidence	..	..	..	..	140
64.	Proof of documents by primary evidence	..	..	..	..	142
65.	Cases in which secondary evidence relating to documents may be given	..	..	..	..	142
66.	Rules as to notice to produce	..	..	..	..	146
67.	Proof of signature and handwriting of person alleged to have signed or written document produced	..	..	..	..	147
68.	Proof of execution of document required by law to be attested	..	..	..	..	148
69.	Proof where no attesting witness found	..	..	..	..	151
70.	Admission of execution by party to attested document	..	..	..	..	152
71.	Proof when attesting witness denies the execution	..	..	..	..	153
72.	Proof of document not required by law to be attested	..	..	..	..	153
73.	Comparison of signature, writing or seal with others admitted or proved	..	..	..	..	154

Public Documents

74.	Public documents	..	..	..	..	155
75.	Private documents	..	..	..	..	157
76.	Certified copies of public documents	..	..	..	..	157
77.	Proof of documents by production of certified copies	..	..	..	..	157

SECTIONS.

PAGES

78. Proof of other official documents	157
---	-----

Presumption as to Documents.

79. Presumption as to genuineness of certified copies	158
80. Presumption as to documents produced as record of evidence ..	159
81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents	161
82. Presumption as to document admissible in England without proof of seal or signature	162
83. Presumption as to maps or plans made by authority of Government	162
84. Presumption as to collections of laws and reports of decisions ..	162
85. Presumption as to powers-of-attorney	163
86. Presumption as to certified copies of foreign judicial records ..	163
87. Presumption as to books, maps and charts	164
88. Presumption as to telegraphic messages	164
89. Presumption as to due execution, etc., of documents not produced	164
90. Presumption as to documents thirty years' old	165

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document	169
92. Exclusion of evidence of oral agreement	178
93. Exclusion of evidence to explain or amend ambiguous document	195
94. Exclusion of evidence against application of document to existing facts	196
95. Evidence as to document unmeaning in reference to existing facts	196
96. Evidence as to application of language which can apply to one only of several persons	197
97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies	197
98. Evidence as to meaning of illegible characters, etc.	198
99. Who may give evidence of agreement varying terms of document ..	198
100. Saving of provisions of Indian Succession Act relating to wills ..	199

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

OF THE BURDEN OF PROOF.

SECTIONS.	PAGES.
101. Burden of proof	200
102. On whom burden of proof lies	201
103. Burden of proof as to particular fact	203
104. Burden of proving fact to be proved to make evidence admissible ..	203
105. Burden of proving that case of accused comes within exceptions ..	204
106. Burden of proving fact especially within knowledge	205
107. Burden of proving death of person known to have been alive within thirty years	206
108. Burden of proving that person is alive who has not been heard of for seven years	207
109. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent	208
110. Burden of proof as to ownership	209
111. Proof of good faith in transactions where one party is in relation of active confidence	212
112. Birth during marriage conclusive proof of legitimacy	214
113. Proof of cession of territory	218
114. Court may presume existence of certain facts	218

CHAPTER VIII.

ESTOPPEL.

115. Estoppel	228
116. Estoppel of tenant ; and of licensee of person in possession	241
117. Estoppel of acceptor of bill of exchange, bailee or licensee	245

CHAPTER IX.

OF WITNESSES.

118. Who may testify	246
119. Dumb witnesses	249

SECTIONS.

PAGES.

120.	Parties to civil suit, and their wives or husbands	249
	Husband or wife of person under criminal trial	249
121.	Judges and Magistrates	249
122.	Communications during marriage	251
123.	Evidence as to affairs of State	252
124.	Official communications	253
125.	Information as to commission of offences	255
126.	Professional communications	256
127.	Section 126 to apply to interpreters, etc.	259
128.	Privilege not waived by volunteering evidence	259
129.	Confidential communications with legal advisers	259
130.	Production of title-deeds of witness not a party	260
131.	Production of documents which another person having possession could refuse to produce	260
132.	Witness not excused from answering on ground that answer will criminate	261
	Proviso	261
133.	Accomplice	262
134.	Number of witnesses	267

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

135.	Order of production and examination of witnesses	267
136.	Judge to decide as to admissibility of evidence	268
137.	Examination-in-chief	270
	Cross-examination	270
	Re-examination	270
138.	Order of examinations	270
	Direction of re-examination	270
139.	Cross-examination of person called to produce a document	275
140.	Witnesses to character	276
141.	Leading questions	276
142.	When they must not be asked	276
143.	When they may be asked	276
144.	Evidence as to matters in writing	277
145.	Cross-examination as to previous statements in writing	278
146.	Questions lawful in cross-examination	282
147.	When witness to be compelled to answer	282
148.	Court to decide when question shall be asked and when witness compelled to answer	282

SECTIONS.

PAGES.

149.	Questions not be asked without reasonable grounds	285
150.	Procedure of Court in case of question being asked without reasonable grounds	286
151.	Indecent and scandalous questions	286
152.	Questions intended to insult or annoy	287
153.	Exclusion of evidence to contradict answers to questions testing veracity	287
154.	Question by party to his own witness	288
155.	Impeaching credit of witness	290
156.	Questions tending to corroborate evidence of relevant fact, admissible	293
157.	Former statements of witness may be proved to corroborate later testimony as to same fact	293
158.	What matter may be proved in connection with proved statement relevant under section 32 or 32	296
159.	Refreshing memory	297
	When witness may use copy of document to refresh memory ..	297
160.	Testimony to facts stated in document mentioned in section 159 ..	298
161.	Right of adverse party as to writing used to refresh memory ..	299
162.	Production of documents.. .. .	300
	Translation of documents	300
163.	Giving, as evidence, of document called for and produced on notice	301
164.	Using, as evidence, of document production of which was refused on notice.. .. .	302
165.	Judge's power to put questions or order production	302
166.	Power of jury or assessors to put questions	305

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167.	No new trial for improper admission or rejection of evidence ..	305
------	---	-----

TABLE OF CASES.

- A. V. Joseph, *v. K. E.*, 21.
 A. V. Palanivelu *v. Neelavati*, 214.
 Abaji *v. Laxman*, 183, 184, 186.
 Abbas Peada *v. Queen-Empress*, 258.
 Abdool Ali *v. Abdoor Ruhman*, 147.
 Abdul Ali *v. Puran Mal*, 106.
 " *Azib v. Ebrahim*, 93.
 " *" v. Kanthu Mallik*, 237.
 " *Basha Sahib, L. re*, 72.
 " *Gafoor v. Crown*, 82.
 " *Gani v. Emp.*, 90.
 " *Ghafur v. Abdul Kadir*, 183.
 " *" v. Hussain Bibi*, 95.
 " *Jalil v. Empress*, 89.
 " *Karim v. Crown*, 8.
 " *" v. Kakam*, 193.
 " *" v. Salin, an*, 152.
 " *Muhammad Khan v. Mahanan-*
 da, 176.
 " *Rahim v. Fakir Mohammad*, 29.
 " *Rasack v. Ma U*, (1898, U. B.
 R. 382), 143.
 " *Salim v. Emperor*, 297, 299.
 " *Subhan Khan v. Nusrat Ali*, 95,
 154.
 Abdulla Paru *v. Gannibai*, 148.
 Abdullakin *v. Mg. Ne Dun*, 182.
 Abinas Chandra *v. Pratul Chandra*, 91.
 Abinash Chandra *v. Dasarath*, 149.
 Achaya *v. Mg. Po Saing*, 202.
 Achhailal *v. K. E.*, 92.
 Achut *v. Shivajirao*, 210.
 Achutaramaraju *v. Subbaraju*, 183, 184.
 Adhar (Bai) *v. Lalbhai*, 184.
 " *Chandra v. Dibakar*, 211.
 Adityam Iyer *v. Rama Krishna*, 184, 189.
 Adu Shikdar *v. Queen-Empress*, 70.
 Advocate, *an*, 114.
 Ady *v. Administrator-General, Burma*,
 190, 191.
 Agarchand *v. Rakhmad*, 240.
 Ahmad Ali *v. Joti Prasad*, 103.
 " *Khan v. Channi Bibi*, 125.
 Ah Foong *v. Emperor*, 62, 77.
 " *Phut v. The King*, 78, 247.
 Ahmed Bhaudin, *v. Babu*, 237.
 " *Miya v. Emp.*, 282.
 Ahsan Husain *v. Maina*, 112.
 Aishan Bibi *v. Crown*, 68.
 Akalsahu *v. K. E.*, 51.
 Akbur Ali *v. Bhyea Lal*, 14, 146.
 Alagappa *v. Ko Kala*, 149, 150.
 Ali Gohar *v. Crown*, 61.
 " *Jawad v. Kalunjan Singh*, 191.
 " *Khan v. Indra Parshad*, 202.
 " *Moidin v. Konbi Achen*, 48.
 " *Nasir v. Manik Chand*, 106.
 " *" v. Pachubibi*, 210.
 Alice Georgiana Pashand *v. Emma*, 52.
 " *Mary Hill v. W. Clarke*, 187.
 Alladad *v. K. E.*, 248.
 Allah Ditta *v. Crown*, 68.
 Amardas *v. Harmanbhai*, 149.
 Ambalal *v. Secretary of State*, 210.
 Ambica Charan *v. Emperor*, 264.
 Ambu Nair *v. Kelu Nair*, 238.
 Amdunjiyan *v. Crown*, 76, 107.
 Ameen Sharif *v. Emperor*, 62.
 Amina Khatun, *Musst. v. Khalil-ur-*
 Rahman, 94, 125.
 Amir Husain *v. Abdul Samad*, 149.
 Amiruddin *v. Emperor*, 66, 70.
 Ammathayarammal *v. Official Assignee*,
 Madras, 289.
 Amrit *v. Nur Muhammad*, 166.
 Amrita Lal *v. Emperor*, 40, 122, 255, 289.
 An Advocate, 114.
 " *Attorney, In re*, 258.
 Anis-ul-Rehman *v. Bani Ram*, 107.
 Annapagauda *v. Sangadigyappa*, 46.
 Annavi Muthiriyar, *Re*, 21, 102.
 Annesley (J.) *v. Earl of Anglesea*, 258.
 Annoda *v. Bhuban*, 213.
 Anupchand *v. Champsi*, 187.
 Anwar Ali *v. Tafozal Ahmed*, 156.
 Appadurai, *In re*, 295.
 Appavu Chettiar *v. Nanjappa*, 48.
 Arjun Sahu *v. Kelai Rath*, 135, 152.
 Arunachalam *v. Rengaswami*, 244.
 Asaram *v. Lubdeshwar*, 183.
 Asgur Hossein, *In re*, 101.
 Ashanullah *v. Trilochan*, 226.
 Asharfi Lal *v. Mt. Nannhi*, 152.
 Asmatunnessa *v. Harendra Lal*, 233.
 Assudibai *v. Haribai*, 236.
 Ata Muhammad *v. Shankar*, 177, 242,
 243.
 Ataya *v. Crown*, 81.
 Atchayya *v. Gangayya*, 4.
 Atchison etc. *R. R. Co. v. W. S.*, 121.
 Athappa Goundan, *In re*, 71, 72, 78.
 Attar Singh *v. Ramditta*, 208.
 Attorney, *In re*, 258.
 Att.-Gen. *v. Drummond*, 19.

- Att.-Gen. v. Hitchcock, 288.
 Aumirtolal v. Rajoneekant, 46.
 Aung Hla v. K. E., 79.
 „ v. Q. E., 77.
 „ Myat v. Hla May, 228.
 „ Rhi v. Ma Aung, 152.
 Autar Singh v. Crown, 15, 89.
 Ava, *in re*, 146.
 Azimuddy v. Emp., 43, 45, 280, 295.
 Aziz Bano v. Muhammad Ibrahim, 121.
 Azizul Hasan v. Mohammad Faruq, 208.
 Azizullah Khan v. Ahmed Ali, 46.

 B. B. SINGH v. K. E., 70, 71.
 B. N. Kashyap v. The Crown, 111.
 Baboo Singh v. K. E., 82, 224, 264.
 Babu v. Sitaram, 196.
 Babui Shamsunder v. Ramkhelawan, 117.
 Bacharam v. Peary, 146.
 Badal Ram v. Jhulaj, 189.
 Badhawa Mal v. Hira, 194.
 Badri Prasad v. Abdul Karim, 149.
 Badrul Islam Ali Khan v. Mst. Ali Begum, 143.
 Bagheshri v. Pancho, 181, 185, 199.
 Bagga Singh v. Empress, 78.
 Bahadur Singh Mohar Singh, 96.
 „ „ v. Viru, 215.
 Bahir Das v. Nobin Chunder, 240.
 Bai Adhar v. Lalbhaj, 184.
 „ Baiji v. Bai Santok, 115.
 „ Kamla v. Babubhai, 216.
 „ Kanta v. Bhailal, 258.
 „ Shanta v. Umrao Amir, 262.
 Baiji (Bai) v. Bai Santok, 115.
 Baijnath Singh v. Hajee Vally Mahomed, 183.
 Baijnath Singh v. Must. Biraj Kuer, 125.
 Bain v. W. & F. Junc. Ry., 3.
 Bal Gangadhar Tilak v. Shri Shrinivas, 104, 280.
 Bala v. Abai, 243.
 Balasundara Naiker v. Ranganatha, 192.
 Balbhaddar v. Maharaja of Betia, 142, 173.
 Balgobin v. Bhaggu Mal, 188.
 Balkaran Singh v. Dulari Bai, 167.
 Balkishen Das v. Legge, 182.
 Balmokand v. Crown, 25.
 Bamandas v. Nilmadhab, 242.
 Bank of England v. Vagliano Bros., 308.
 Bank of Khulna v. Jyoti Prokash, 214.
 Bank of New Zealand v. Simson, 194.
 Banka Behary v. Raj Kumar, 120.
 Banku Behari v. Secretary of State, 245.
 Banna v. Empress, 75, 79.
 Bannu Mal v. Munshi Ran, 225.

 Bansi Lal v. Dhapo, 117.
 „ Singh v. Chakradhar, 240.
 Banu Singh v. Emperor, 266.
 Banwari Lal v. Jagannath, 190.
 Bapuji v. Bhagvant, 210.
 Barikrao v. Crown, 107.
 Barindra Kumar v. Emperor, 8, 24, 25, 26, 154, 277.
 Barkat Ali v. Crown, 263, 294.
 Barnard, 23.
 Barrow's Case, 237.
 Basangouda v. Basalingappa, 231.
 Basant Singh v. Kunwar Brijraj, 145, 168.
 Basapa v. Basapa, 210.
 Basharat v. Najib Khan, 207.
 Bashiran v. Mohammad Hussain, 51, 96.
 Bati Reddi, 76.
 Benarsi Das v. Bhikari Das, 175.
 Beni Madhab v. Sadasook, 185.
 „ Madho v. K. E., 264.
 Benode Lal v. Bajendra, 185.
 Berkeley Peerage case, 94.
 Bhaba Sundari v. Ram Kamat, 192.
 Bhagabatcharan v. Emp., 60.
 Bhagwan Baksh v. Mahesh Bakhsh, 216.
 Bhagwandas Narandas v. Patel & Co., 117.
 Bhaiya Saheb v. Pt. Ramnath, 253.
 Bhalchandra v. Chanbasappa, 254.
 Bhanudas v. Krishnabai, 106, 156, 159.
 Bharosa v. Crown, 70.
 Bhawanji Harbhum v. Devji, 148, 187.
 Bhikaji v. Balvant, 119.
 Bhima v. Dhulappa, 214, 216.
 Bhimappa Saibanna, 80.
 Bhogilal v. Roy. Ins., Co., 288, 291, 297.
 Bhogi Ram v. Kishori, 184, 191.
 Bhoy Hong Kong v. Ramanathan Chetty, 105, 228.
 Bhrigu Datt v. Gaya Prasad, 177.
 Bhubanbijay Singh v. Emp., 227.
 Bhukin v. K. E., 55, 82.
 Bichha Lal v. Jai Pershad, 106.
 Bidullah v. Q. E., 62.
 Bigsby v. Dickinson, 267.
 Bikram Ali v. Emp., 289.
 Bilas Kunwar v. Desraj, 242, 243.
 Bimalkrishna v. Emperor, 264.
 Binayendra Chandra v. Emperor, 10.
 Binja Ram v. Rajmohan Roy, 173.
 Bipin Behary v. Sreedam Chunder, 97.
 Bipro Das v. Secy. of State, 260.
 Birchall v. Bullough, 298.
 Biro v. Atma Ram, 95.
 Bishen Das v. Ram Labhaya, 44, 111, 115.
 Bishnu Pada v. Emp., 266.
 Bishop of Meath v. Marquess of Winchester, 169.

- Bitto Kunwar v. Kesho Pershad, 27, 32.
 Bodha Ganderi v. Ashloke Singh, 211.
 Bogar v. Karam Singh, 244.
 Bomajee Cowasjee, *In re*, 294.
 Bombay Cotton Mfg. Co. v. Raja Bahadur Shivalal, 282.
 Bonnerji (K. S.) v. Sitanath Das, 144.
 Booth v. Emperor, 29.
 Brajeshware v. Budhanuddi, 238.
 British India S. N. Co. v. Hajee Mahomed, 208.
 Brohmo Dutt v. Dharmo Doss, 234.
 Browne v. Dunn, 279.
 Bulaki Mal v. Floyd, 183.
 Bulakidas v. Shaikh Chhotu, 147, 148.
 Bulagi v. Crown, 58, 59, 65, 66.
 Burjorji v. Muncherji, 135.
 Burrough v. Martin, 297.
 Buta Singh v. Crown, 100.

 C. W. KINLOCK v. Asa Ram, 190.
 Cairncross v. Lorimer, 236.
 Carr v. L. & N. W. Railway Co., 233.
 Casamally v. Sir Currimbhoy, 230.
 Central India Spg., Co. v. G. I. P. Rly., 260.
 Chain Mahto v. Emperor, 14, 15.
 Chainchal Singh, 100, 101.
 Chanda Singh v. Amritsar Bank, 176.
 Chandra Dhar Tewari v. Dy. Comr., Lucknow, 254, 255.
 „ Kali v. Bhabutti Prasad, 151, 153.
 „ Kunwar v. Narpal, 201.
 „ Narayan v. Ramchandra, 261.
 Chandrasekera v. The King, 20, 87, 88, 136.
 Chandrathan v. Crown, 24.
 Chandreshwar Prasad v. Bisleshwar, 91, 97, 103, 145.
 Chandrika Ram v. K. E., 20, 87, 88.
 Chandu Lal Agarwala v. Khalilur Rahman, 126, 221.
 Chandulal v. Bai Kashi, 166.
 Charitar Rai v. Kailash Behari, 167.
 Chenbasapa v. Lakshman, 175.
 Chenchiah v. K. E., 177.
 Chettiar Firm v. Ko Maung, 240.
 Chhaganlal v. Jagjivandas, 190.
 Chhato Ram v. Bitto Ali, 46.
 Chhotalal v. Bai Mahakore, 177.
 Chidambaram Chettiar v. Krishna, 185.
 Chimanram v. Divanchand, 171, 186, 188.
 Chinnaji Govind v. Dinkar, 14, 141, 146.
 Chowgatta v. Chatar Singh, 171.
 Christien v. Delaney, 109.
 Chuni Kuar v. Udai Ram, 202, 228.
 Cockman v. Cockman, 93.
 Collector of Benares v. Sheo Prasad, 3.
 Collector of Etah v. Kishori Lal, 192.
 „ Gorakhpur v. Palakdhari, 13, 30, 31, 110, 116, 270,
 „ Gorakhpur v. Ram Sundar, 32, 107.
 „ Jaunpur v. Jamna Prasad, 255.
 Com. v. Webster, 18.
 Conroy v. King-Emperor, 201.
 Cook v. Ward, 99.
 Coole v. Braham, 48.
 Coulson v. Disborough, 304.
 Crown v. Ibrahim, 280.
 „ v. Mt. Soma, 4.
 „ v. Saifal, 222.
 „ v. Sant Singh, 206.
 Currimbhoy & Co. v. Creet, 244.
 Cutts v. Brown, 180, 185, 188.
 Cyril Gibbs v. Ellen Gibbs, 220.

 D. G. SAHASRABUDHE v. Kilachand, 112.
 Dada Honaji v. Babaji, 190.
 Dadabhai v. Sub-Coll. of Broach, 210.
 Dadan Gazi v. Emperor, 281.
 Dagdu v. Nama, 185.
 Dal Bahadur v. Bijai Bahadur, 92, 94, 103.
 „ Singh v. Emperor, 282, 306.
 Dalglish v. Guzuffer Hussein, 115.
 Dalchand v. Lotu, 149.
 Damodar v. Atmaram, 144, 175.
 Damodhar v. Deoram, 218.
 Daniel v. Pitt, 49.
 Dattoo v. Ramchandra, 183, 184.
 Davood Rowther v. Ramanathan, 152, 153.
 Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, 231.
 Deba v. Rohtagi Mal, 212.
 Debi Churn v. Issur Chunder, 211.
 Debi Pershad v. Radha Chowdhraim, 96.
 D'Cruz v. Jitendra Nath, 193.
 Deena Bandhu v. Makin Sardar, 232, 243, 244.
 Deo Nandan v. Emperor, 266.
 Deoji v. Pitambar, 195.
 Deolie Chand v. Nirban, 239.
 Deonandan v. K. E., 68.
 Deputy Com. of Bara Banki v. Ram Parshad, 91, 105.
 Devidas v. Pirjada Begam, 306.
 „ v. Shamal, 243.
 Devidatt v. Shriram, 32, 33, 145, 156.
 Dewan Singh v. Must. Santi, 33.
 Dhanapati De v. Emp., 55, 77, 263, 266.
 Dhaneshwar Sahu v. Ramrup Gir, 176.
 Dhanmull v. Ram Chunder, 97.
 Dhanpat Rai v. Guranditta Mal, 237.
 Dhanu Pathak v. Sonu Koeri, 237.

- Dhanu Ram v. Murli Mahto, 268.
 Dhanraj v. Soni, 237.
 Dharam Kunwar v. Balwant, 241.
 Dharni Kanta v. Gabar Ali, 210.
 Dharup Nath v. Gobind, 207.
 Dhian Singh v. Gurdit Singh, 228.
 Dhyani Gope v. K. E., 223.
 Dial Singh v. Crown, 78.
 Dinanath Rai v. Ram Rai, 147.
 Dinendronath v. Ramcoomar, 52.
 Dinomoni Chowdhurani v. Brojo Mohini,
 32, 96.
 Dinomoyi Debi v. Roy Luchmiput, 136.
 Dirgaj Deo v. Beni Mahto, 106.
 Doe *dem.* Gwillim v. Gwillim, 195.
 „ *dem.* Hiscocks v. Hiscocks, 197.
 „ *dem.* Johnson v. Baytup, 242, 244.
 „ *dem.* Neale v. Samples, 168.
 Dolatsinghji Jaswantsinghji v. Khachar
 Mansur, 83.
 Doutre v. Dautre, 215.
 Dowlatram v. Vasdeo, 191.
 Dukh Haran v. Com. Cre. Corp., 201.
 Dulip Singh v. Durga Prasad, 173.
 Durlav Namasudra v. Emp., 66.
 Dwarka Das v. Sant Bakhsh, 106.
 „ Doss v. Baboo Jankee Doss,
 106.
 Dwyer v. Collins, 144.
 EBRAHIMBOY Pabaney v. Hashan, 172.
 Edington v. Fitzmaurice, 4.
 Edwards, *Ex parte*, 93.
 Ekcowree Singh v. Kylash Chunder, 163.
 Ekoba v. Dayaram, 243.
 Elahi Baksh v. Emperor, 161.
 Emperor v. Abani Bhushan, 25, 77.
 „ Abdul Gani, 23, 164, 221.
 „ „ Wahid Khan, 41.
 „ Akbar Badoo, 296.
 „ Akbarali, 89.
 „ Allisab, 266.
 „ Alloomiya, 38, 39, 130.
 „ B. G. Tilak, 267.
 „ Babulal, 122.
 „ Baji Krishna, 266.
 „ Bala, 257.
 „ Balaram Das, 89.
 „ Banarsi, 262.
 „ Bansilal, 45.
 „ Bhagi, 56.
 „ Bhagwandas Bisesar, 56, 77,
 80.
 „ Tulsidas, (No. 2.), 115.
 „ Bhikha, 68, 155.
 „ Bhimrao, 266.
 „ Bhishun Datt, 280.
 „ Bhola Nath, 24.
 „ Bilal, 255.
 „ Bishun Datt, 292.
 Emperor v. Chaturbhuj Sahu, 263.
 „ Chatur Singh, 262.
 „ Chavadappa, 223.
 „ Chhidda, 221, 222.
 „ Chokhey, 71.
 „ Cooper, 78.
 „ Cunna, 58.
 „ Dahyabhai, 205.
 „ Debendra Prasad, 38, 40, 41.
 „ Deokinandan, 62.
 „ Dhanka, 64, 161.
 „ Dhondu, 204.
 „ Dinanath, 59.
 „ Dinshaw, 62.
 „ Dost Muhammad, 101.
 „ Durning, 130.
 „ Fakir Mahomed, 122.
 „ Fernand, 59.
 „ Gajendra Mohan, 102.
 „ Ganesh Chandra, 58, 59, 72.
 „ Ganga Sahai, 262.
 „ Gangappa, 78, 265.
 „ Gangaram, 38, 39, 129.
 „ Ganpat, 154, 155.
 „ Ganu Chandra, 20, 70.
 „ Ghulam Mustafa, 285.
 „ Goma Rama, 27.
 „ Govind Balvant, 265.
 „ Gulabu, 177.
 „ Haji Sher Mahomed, 38, 39,
 63.
 „ Hanmaraddi, 295.
 „ Har Piari, 59.
 „ Hari, (6 Bom. L. R. 887),
 222.
 „ „ (20 Bom. L. R. 365),
 247.
 „ Harjivan Valji, 40.
 „ Hasan Abdul Karim, 205.
 „ Hira Gobar, 20, 21, 63.
 „ Hori Lal, 222.
 „ Jagannath, 221.
 „ Janki Prasad, 10.
 „ Jehangir, 265.
 „ Jhabwala, 122.
 „ Jogendra Nath Ghose, 161.
 „ Kadhe Mal, 102.
 „ Kalwa, 79, 224.
 „ Kagal Mali, 9, 62, 68.
 „ Kasamalli, 201, 275.
 „ Kehri, 81.
 „ Keramat Sirdar, 76.
 „ Keshav Narayan, 26.
 „ Kheoraj, 76.
 „ Khetal, 58.
 „ Kostalkhan, 266.
 „ Krishna, 80.
 „ Kuberappa, 266.
 „ Kunwarpal Singh, 88.
 „ Kutub Bux, 57.

- Emperor v. Lakshman, 280.
 „ Lalit Mohan, 78, 81, 264.
 „ Lal Miya, 304.
 „ Laxman, 79.
 „ Leslie Gwilt, 226.
 „ Mahadeo, 78.
 „ „ Devoo, 90, 297.
 „ „ Taty, 201.
 „ Mahamadbuksh, 60, 73.
 „ Mahomed, 64.
 „ „ Hasan, 64.
 „ „ Yusuf, 104.
 „ Makhan Lal, 301.
 „ Mallangowda, 65.
 „ Manchankhan, 21.
 „ Manohar, 80.
 „ Mareppa, 70.
 „ Mataprasad, 224.
 „ Mavji, 223.
 „ Mhabli, 64.
 „ Misri, 58.
 „ Mohammad Shaikh, 88, 295.
 „ Mohanlal, 8.
 „ Mokbul Khan, 290.
 „ Motiram, 87.
 „ Must. Anandi, 204.
 „ Nabab Ali, 161, 177.
 „ Namdeo Kaikadi, 69.
 „ Nanoo, 62.
 „ Nanua, 20, 71.
 „ Narayen, 55, 56, 58, 307.
 „ Narbada Prasad, 105.
 „ Nazir, 57, 81.
 „ Panchkowri Dutt, 58.
 „ Panchu Das, 26, 40, 42, 306, 307.
 „ Papa Kamalkhan, 266.
 „ Parbhoo, 2, 9, 204.
 „ Ponde (No. 2), 124.
 „ Prannath Nath, 262.
 „ Premananda, 89.
 „ Qudrat, 122.
 „ Radhe Halwai, 161.
 „ Rafique-ud-din, 19.
 „ Rahemuiddin Mandal, 280, 295.
 „ Rama Sattu, 89, 296.
 „ Ramchandra, 251.
 „ Ramnath, 45, 64, 73.
 „ Ramrao, 155.
 „ Rodrigues, 257.
 „ Rustam Lam, 8.
 „ Sabitkhan, 79, 265.
 „ Sadeppa, 275.
 „ Sadhu Charan Das, 20, 87.
 „ Salve, 70.
 „ Savlaram, 226.
 „ Savlimiya, 102.
 „ Shafi Ahmed, 8, 10, 11, 24.
 „ Shaikh Usman, 280.
 Emperor v. Shambhu, 77, 81.
 „ Shankarshet, 266.
 „ Shib Charan, 227.
 „ Shiv Kali, 18.
 „ Shivabhai, 77.
 „ Shivdas Omkar, 9.
 „ Shivputraya, 69, 223.
 „ Shrinivas, 11, 263, 265.
 „ Sidheshwar, 64.
 „ Spratt (2), 38.
 „ „ (3), 38.
 „ Sughar Singh, 223.
 „ Suntu, 80.
 „ Surajbali, 160.
 „ Thakur Das, 57, 160.
 „ Tilak, 267.
 „ Tuti Bahu, 7.
 „ Ujagar, 267.
 „ Vithu Balu, 280.
 „ Wahiduddin (No. 1), 23, 29, 38, 130.
 „ Wahiduddin (No. 2), 296.
 „ Yakub Ali, 41.
 „ Yeshaba, 222.
 „ Yusuf Mian, 204.
 „ Zavar Rahman, 279.
 Empress v. Ashootosh, 4, 7, 79.
 „ Daji Narsu, 74, 75.
 „ Donnelly, 251.
 „ Durant, 248.
 „ Girish Chunder, 304.
 „ Lester, 65.
 „ M. J. Vyapoory Moodeliar, 15, 28, 38.
 „ Naba Kumar, 39.
 „ Pitambur Singh, 95, 127.
 „ Rama Birapa, 18, 62, 75.
 Empress of India v. Chidda, 250.
 „ „ Ganraj, 77.
 „ „ Mulu, 102.
 „ „ Pancham, 62, 63.
 „ “Englishman” v. Lajpat Rai, 134, 158.
 Entisham Ali v. Jamna, 145, 170.
 Ertaza Hossein v. Bany Mistry, 211.
Ex parte Edwards, 93.
 Ezra v. Secretary of State, 3.
 FAKHRUDDIN v. The Crown, 76.
 Fani Bhushan v. Surjya Kanta, 207.
 Fanindra Nath v. Emperor, 295.
 Farid v. King-Emperor, 61, 64.
 Farid-un-nisa v. Mukhtar, 213.
 Fatan v. Emad, 210.
 Fatesingji v. Bamanji, 177.
 Fathuma Bivi v. Hanumantha, 190.
 Fatteh Singh v. Mian Singh, 171.
 Fazl Ahmad v. Crown, 156.
 Federal India Assc. Co. v. Anand Rao, 7.
 Feroz Shah v. Sohbat, 184.
 First Grade Pleader, *In re*, 124.

- Fitz-Holmes v. Bank of Upper India, 184.
 Folkes v. Chadd, 123.
 Foolkissory v. Nobin Chunder, 104.
 Forbes v. Ralli, 240.
 Fowkes, 15.
 Framji Bhicaji v. Mohansing, 257, 259.
 G. V. RAMAN v. Emp., 270.
 Gadigeppa v. Balangowda, 234.
 Gajadhar Lal v. K. E., 295.
 Gajanan v. Nilo, 236.
 Gajanfar Ali Khan v. Province of Assam, 32.
 Ganesb Buv v. Mohammad, 207.
 " Das Aurora, *In re*, 207.
 Ganga Ram v. Habib-ullah, 257, 301.
 " Sahai v. Hira Singh, 236.
 Gangabai v. Fakirgowda, 107.
 Gangandhar Singh v. Sir Rameshwar, 118, 234.
 Gangamull, 75.
 Ganges Manufacturing Co. v. Souruj-mull, 233.
 Ganpat Rai v. Multan, 243.
 Ganpatrao v. Bapu, 194.
 Ganu v. Bhau, 185.
 " Chandra v. Emp., 65.
 Gaura Dei, Mt. v. Raja Mohammad Yasin, 236.
 Gaya Prasad v. K. E., 264.
 George Gordon (Lord), 25.
 Georgiana Pashand v. Emma, 52.
 Ghadiali v. Ghadiali, 275.
 Ghanaya Lal v. Ralia Ram, 192.
 Ghandhi v. The King, 88, 40.
 Ghanshiam Lalji v. Ram Narain, 190.
 Ghasiram v. Kundanbai, 231.
 Ghazi v. Crown, 89.
 Ghudo v. K. E., 263.
 Ghulam Haidar v. Crown, 99.
 " Mohy-ud-Din v. Khizar, 216.
 " Rasul v. Sec. of State, 107.
 " Sarvar v. The Crown, 204.
 Gibbs v. Ellen Gibbs, 220.
 Gibson v. Jeyes, 213.
 Giddigadu v. Emp., 79.
 Girish Chunder v. Q. E., 251.
 Gobaraya v. Emp., 77, 79.
 Goberdhan Singh, v. Ritu, 120.
 Gobind Das v. Rup Kishore, 158.
 " Prasad v. Mohan Lal, 209, 211.
 Gobinda Narayan v. Sham Lal, 33.
 Gogun Chunder v. Empress, 117.
 Gokhul Pande v. Baldeo, 95, 97.
 Gokul Prasad v. Saran Das, 239.
 Golap Chand v. Thakurani Mohakool, 174.
 Goma Rama, 27.
 Gopalasami v. Arunchellam, 215.
 Gopalayyan v. Raghupatiyyan, 31.
 Gopal v. Achut, 184.
 " v. Krishna, 227.
 " Bhimji v. Manaji, 207.
 " Lall v. Manik Lal, 304.
 Gopessur Dutt, *In the goods of*, 268.
 Gopeswar Sen v. Bejoy Chand, 105, 106.
 Gopi Chand v. Crown, 280, 292.
 " Lakhpat Rai, 257.
 " Nath v. Srimatei Chameli, 175.
 Gopika Raman v. Atal Singh, 33.
 Gordon (Lord George), 25.
 Goseti Subba v. Varigonda, 185, 192.
 Goswami Sri Ghanshiam Lalji v. Ram Narain, 190.
 Gouridas Namasudra v. Emperor, 172.
 Government of Bengal v. Santiram, 302.
 " of Bombay v. Samuel, 8, 205.
 Govind Vaman v. Sakharam, 239.
 Govinda v. Crown, 263.
 " v. King-Emperor, 64.
 " Hazra v. Protap Narain, 166.
 " Kuar v. Lala Kishun, 120.
 Govindbhai v. Dahyabhai, 211.
 Govindji v. Chhotalal, 32, 45.
 Guja Majhi v. King-Emperor, 161.
 Gujerat Gin. &c. Co. v. Motilal, 227.
 Guju Lal v. Fatteh Lal, 15, 27, 30, 31, 115, 116.
 Gul Hassan v. King-Emperor, 77.
 Gulab Chand v. Manni Lal, 105.
 Gulabchand v. Chunilal, 34, 117, 234.
 Gulam Ali v. Aga Khan, 238.
 Gulzar Ali v. Fida Ali, 240.
 Gunga Ram v. Emp. of India, 145.
 Gurbaksh Singh v. Gurdial Singh, 206, 269.
 Gurubaru Praja v. King, 71.
 Gurudin v. Emperor, 103.
 Guruswami, 89.
 Gwillim v. Gwillim, 195.
 Gyan Singh v. Budha, 134.
 Gyannessa v. Mobarakannessa, 28, 52.
 H. H. The Maharaja of Kashmir v. Mohan Lal, 134.
 Haagen Swendsen, 276.
 Haidar Ali v. Abru Mia, 262.
 Hajee Haroon v. Molvi Abdul Karim, 257, 259.
 Haji Sheikh Bodha v. Sukharam Singh, 167.
 Hakam v. Crown, 68.
 Hakiman v. Emperor, 55, 64.
 Hana v. Lokumal, 144.
 Hanif-un-nissa v. Faiz-un-nissa, 194.
 Hanmantrao v. Sec. of State, 212.
 Hanmantrav v. Sec. of State, 210.
 Hannah v. Juggernath & Co., 246.
 Har Dayal Singh v. King-Emperor, 10.
 Haradhan v. Iswar Das, 211.

- Haranchandra Chakrabarti v. Kali-
 prasanna, 177.
 Haranund Roy v. Ram Gopal, 164.
 Harbans Sahai v. Emp., 253.
 Hendra Prasad v. Emperor, 201.
 Hari v. Dhondi, 209.
 " Chintaman v. Moro, 15.
 " Dhangar v. Biru, 165.
 " Kishore v. Abdul Baki, 251.
 " Krishna v. King-Emperor, 8.
 " Nath Ghosh v. Nepal, 151.
 Harihar Partap v. Bisheshwar, 96.
 Harkrishnadas v. Crown, 226.
 Harripria Debi v. Rukmini Debi, 144.
 Harrison v. Vallance, 48.
 Hasanali v. Darashah, 161.
 Hashim v. Crown, 223.
 " v. Empress, 160.
 Hashmat Khan v. The Crown, 57.
 Hassan v. Fazal Wahid, 209.
 " Ali v. Gauzi Ali, 185.
 Hawaldar Singh v. King-Emperor, 8, 10.
 Hawkins v. Powells Tillery, etc., 8.
 Hazura Singh v. Mohindar, 95.
 Heiniger v. Droz, 94.
 Hem Chandra v. Suradhani, 214.
 Heramba Lal v. Emp., 279.
 Hill v. W. Clarke, 187.
 Hillaya v. Narayanappa, 244.
 Hill's case, 248.
 Hira Bhagat v. Gobind, 106.
 " Bibi v. Ram Hari, 153.
 " v. Ramdhan Lal, 152.
 " Lal v. Benarsi Das, 190.
 " " Datadin, 175.
 " " Ganesh Prasad, 145.
 Hiran Miya, 63.
 Hiscocks v. Hiscocks, 197.
 Hodgson's Case, 285.
 Hoghton v. Hoghton, 53.
 Holt & Co. v. Collyr, 198.
 Honappa v. Narsapa, 120, 235.
 Hook Saing v. Mg. E. Hla, 107.
 Hoti Lal v. Mt. Ram Piari, 213.
 Htin Gyaw v. K. E., 27.
 Hukumchand v. Hiralal, 188.
 Hunoomanpersaud v. Mt. Babooee, 232.
 Hurlpurshad v. Sheo Dyal, 7, 30.
 Hurro Chunder Pal, *In re*, 251.
 Ibrahm Ahmad v. Emp., 62.
 Ilhai Bakhsh v. Empress, 44.
 Imamuddin v. K. E., 82.
 Imperatrix v. Pandharinath, 61, 63, 64.
 " Pitamber, 62, 306, 307.
 Ina Sheikh v. Queen-Empress, 222.
 Inayat Khan v. Crown, 89.
 Indar Singh v. Fateh Singh, 31, 116.
 Indarjit v. Lal Chand, 187.
n re Abdul Bashia Sahib, 72.
In re an Advocate, 114.
 " an Attorney, 258.
 " Appadurai, 295.
 " Asgur Hossein, 101.
 " Athappa Goundan 71, 72, 78.
 " Ava and Brenhilda, 146.
 " Bomanjee Cowasjee, 294.
 " Empress v. Girish Chunder, 304.
 " First Grade Pleader, 124.
 " Ganesh Das, 207.
 " Gopessur Dutt, 268.
 " Hurro Chunder, 251.
 " Iswar Chunder Guho, 3.
 " Jhubboo Mahton, 298, 299.
 " Kali Churn Chumari, 238.
 " Lubeck, 7.
 " Marudamuthu Padayachi, 78.
 " Mylswami, 122.
 " Panchanathan, 64.
 " Periyaswami Moopan, 76, 77.
 " Premchand Dowlatram, 276.
 " Purmanandas, 20.
 " River Steamer Co., 53.
 " Rochia Mohato, 90, 103, 104.
 " Rudolf Stallmann, 2.
 " Samiruddin, 89, 298.
 " Seshapani, 61.
 " Sladen, 163.
 " Sowdamonee Debya v. A. Spald-
 ing, 190.
 " Stringer's Estate, 242.
 " Surat Dhobni, 15.
 " Syamo Maha Patro, 20, 77, 81.
 " Tollemache, 93.
 " Veera Koravan, 275.
 Irfanali v. Jogendrachandra, 187.
 Ishan Chunder v. Beni Madhub, 51.
 Ishar Singh v. Crown, 79.
 Ismail v. Crown, 82.
 " Ariff v. Mahomed Ghouse, 212.
 Iswar Chunder Guho, *In re*, 3.
 J. ANNESLEY v. Richard Earl of Angle-
 sea, 258.
 Jacks & Co. v. Joosab Mahomed, 235.
 Jacob & Co. v. Vicumsey, 175.
 Jadobram v. Bulloram, 301.
 Jadu Nath v. Mahendra Nath, 296.
 " Rai v. Bhubotaran Nundy, 269.
 Jaffarul Hossain v. Emperor, 253.
 Jagadbhandu v. Radha Krishna, 237.
 Jagannath v. K. E., 262.
 " alias Khairati v. K. E.,
 263, 264.
 " Khan v. Bajrang, 149.
 " Prasad v. Crown, 87.
 " v. Syed Abdullah,
 230.
 " Ravji, 152.
 " Shankar, 192.

- Jagannatha Mudali v. Chinnaswami, 216.
 Jagapati v. Ekambara, 46.
 Jagan Nath v. Lalta Prasad, 234.
 Jagatpal Singh v. Jageshar, 96.
 Jagat Singh v. Devi Ditta, 193.
 Jagudindra v. Secretary of State, 162.
 Jagwa Dhanuk v. K. E., 129, 295.
 Jagwant Singh v. Silan Singh, 83, 237.
 Jahangir v. Sheoraj Singh, 95.
 Jain Lal v. K. E., 206.
 Jainath Kuar v. Danpal Singh, 97.
 Jang Bahadur Singh v. Arjun Singh, 97.
 Jakhomull v. Saroda Prosad Dey, 237.
 Jaladu, 4.
 Jamunia v. Emp., 66.
 Janardan v. Venkatesh, 186, 188.
 Janat Bibi v. Ghulam Husain, 33.
 Jang Bahadur v. Shankar, 46.
 Janki Kuer v. Birj Bhikhan, 177.
 Janu Kadir v. Crown, 92.
 Jarat Kumari v. Bissessur, 122.
 Jariut-ool-Bhuttool v. Mt. Hoseinee Begum, 226.
 Jas Bahadur v. K. E., 58.
 Jassu Ram v. The Crown, 122.
 Jayawant v. Ramachandra, 207.
 Jhangir v. Secretary of State, 255.
 Jesa Lal v. Mt. Ganga Devi, 167.
 Jeshanker v. Bai Divali, 207.
 Jethabhai v. Nathabhai, 235.
 Jethibhai v. Putlibai, 92.
 Jewan Lal v. Nilmani, 297.
 Jhamplu v. Kutramani, 177.
 Jhanda Singh v. Sheikh Wahiduddin, 184.
 Jhinguri Tewari v. Durga, 235.
 Jhubboo Mahton, *In re*, 298, 299.
 Jitendra Nath v. Manmohan, 226.
 Jodh Singh v. Sundar Singh, 209.
 Jogendra Chunder v. Dwarka Nath, 43.
 „ Lal v. Mohesh Chandra, 243.
 Johnson v. Baytub, 242, 244.
 Johnston v. Gopal Singh, 232.
 Jones Bros. v. Woodhouse, 237.
 Joseph (A. V.) v. K. E., 21.
 Jowala Buksh v. Dharum Singh, 210.
 „ Sahai v. Crown, 15.
 Joy Coomar v. Bundhoo Lall, 9.
 Juggomohun v. Manickchund, 31.
 Jugmohandas v. Sir Mangaldas, 125.
 Jugtanand v. Nerghan Singh, 190.
 Jumna Doss v. Srinath Roy, 171, 180.
 Juttendromohun v. Ganendromohun, 83.
 Jwala Prasad v. Mohan Lal, 192.
 Jyoti Prasad v. Bharat Shah, 33.
 Jyotish Chandra v. Emperor, 161.
 K. M. P. R. M. FIRM v. Somasundram Chetty & Co., 194.
 K. S. Bonnerji v. Sitanath, 144.
 Kailasa Padiachi v. Ponnukannu, 46.
 Kailash Chandra v. Sheikh Chhenu, 193.
 Kalachand v. Queen-Empress, 290.
 Kalandan v. Kunhunni, 146.
 Kali Bakhsh v. Ram Gopal, 213.
 „ Churn Chunari, *In re*, 298.
 „ Jeeban Bhattacharjya v. Emperor, 18, 81.
 „ Pad Upadhya v. K. E., 134.
 Kalidhun v. Shiba Nath, 30.
 Kalikumar Pal v. Rajkumar, 257, 258.
 Kalka Parshad v. Mathura, 95.
 Kallu v. Sital, 262.
 Kalu v. Barsu, 210.
 „ Mirza v. Emperor, 28.
 Kalyanchand v. Sitabai, 113, 114.
 Kalyanji v. Dharamsi, 193.
 Kamala Prasad v. Sital Prasad, 266.
 Kamawati v. Digbijai, 213.
 Kameshwar Pershad v. Amanutulla, 259.
 Kamla (Bai) v. Babubhai, 216.
 „ Prasad v. Hasan Ali, 188.
 Kanayalal v. Pyarabai, 142.
 Kandasami v. Nagalinga, 238.
 Kaniza v. Hasan Ahmed, 217.
 Kanta (Bai) v. Bhailal, 258.
 Kanto Prashad v. Jagat Chandra, 108.
 Karampalli Unni v. Thekku Vittil, 193.
 Karapaya Servai v. Mayandi, 96, 216.
 Karpini v. Queen-Empress, 222.
 Kartar Singh v. Crown, 264.
 Karu v. K. E., 55.
 „ Singh, 247.
 Karuppa Goundan v. Periatambi Gounden, 197, 198.
 Karuppan Samban, 89.
 Kashimuddin v. Emp., 78, 82.
 Kashi Nath v. Brindaban, 187.
 Kashyap (B. N.) v. The Crown, 111.
 Kattika Bapanamma v. Kattika Krishnamma, 193.
 Kazi Gulam Ali v. Aga Khan, 288.
 „ Syed Karimuddin v. Meherunnisa Begum, 235.
 Kedar Nath v. Bhupendra Nath, 268.
 Kemble v. Farren, 47.
 Keolapati v. Harnam, 168.
 Kesarbai v. Rajabhau, 182.
 Kesava Pillai, 81.
 Keshab Deo v. Emp., 222.
 Keshavrao v. Raya, 184, 187.
 Kesho Prasad v. Bhagjogna, 33, 94, 107.
 Kettilamma v. Kelappan, 118.
 Ketu Das v. Surendra Nath, 243.
 Kha Hlaw v. King-Emperor, 66, 68.
 Khadijah v. Abdool Kureem, 292.
 Khadim Ali v. Jagannath, 157.
 Khajah Abdool Gunee v. Gour Monee, 45.

- Khan Gul v. Lakha Singh, 234.
 Khankar Abdur v. Ali Hafez, 183.
 Khaver Sultan v. Rukha Sultan, 27.
 Kheman v. Crown, 160.
 Khenum Kuree v. Gour Chunder, 47.
 Khijiruddin Sonar v. Emperor, 15, 154, 289.
 Khiro Mandal v. Emperor, 57.
 Khuda Baksh v. Budhar Mal, 190.
 " v. Crown, 62.
 Khudawand Karim v. Narendra, 182.
 Khumaji Gajaji v. Damji, 182.
 Khurshaid Hussain v. Crown, 89.
 Khwaja Nazir Ahmed v. Crown, 253.
 Kilabhaj v. Hargovan, 243.
 King v. Nga Myo, 265.
 " v. Parker, 294.
 King-Emperor v. Akhileshwari Prasad, 57, 58.
 " Bhagawati Prasad, 255.
 " Kalloo, 224.
 " Malhar, 266.
 " Mangru, 82.
 " Maqbul, 82.
 " Maung Tha, 295.
 " Mst. Jagia, 64.
 " Nga Aung Ba, 68.
 " " Ba Shein, 129.
 " " Hlaing, 295.
 " " Lun Thoun, 282, 295, 298.
 " " Po Min (2 L. B. R. 168), 66.
 " " (10 Ran. 511), 248.
 " Nilkanta, 264.
 " Pancham, 62, 64.
 " Ramanujam, 67.
 " Rang, 53.
 " Sadashibo, 74, 79.
 " Somra Bhuiyan, 90.
 " Tun Hlaing, 2, 155.
 " U. Damapala, 202, 204, 205, 206.
 " of India v. Sobha Ram, 248.
 Kinlock v. Asa Ram, 190.
 Kishan Lal v. Ram Lal, 194.
 Kishore Chand v. Guran, 190.
 Kishori Lal v. Rakhilal Dass, 181, 146.
 Komalsing v. Krishnabai, 148.
 Kottaya v. Emperor, 67.
 Kowsulliah v. Mukta, 46.
 Krishan Datt v. Ahmadi, 31.
 Krishna Aiyar v. Sec. of State, 211.
 " Ayyar v. Balakrishna, 304.
 " Chandra v. Rasik Lal, 239.
 " Kahar v. Emp., 247.
 " Kishore v. Kishori Lal, 148, 144.
 Krishna Prasad v. Adyanath, 242.
 " Prosad v. Baraboni Coal Con- cern, 242, 243, 244.
 Krishnacharya v. Lingawa, 210.
 Krishnadas v. Vitkoba, 118.
 Krishnaji v. Rajmal, 45, 175, 236.
 Krishnama Naicken, 89.
 Krishnarav v. Vasudev, 210, 212.
 Krishnayya Rao v. Venkata, 103.
 Kumal Sheriff v. Ma Shwe Yet, 241.
 Kumar Ganganand v. Maharajah Sir Rameshwar, 118, 234.
 Kumara v. Srinivasa, 185.
 Kundan Lal v. Mushrraffi Begam, 214.
 Kunja Subudhi v. K. E., 59, 82.
 Kunwar Bahadur v. Suraj Bakhsh, 177.
 " Sen v. K. E., 78.
 Kuppuk Konan v. Thirugnana, 244.
 Kusum Kumari v. Satya Ranjan, 268.
 LACHHO v. Har Sahai, 211.
 Lachman Das v. Baba Ramnath, 193.
 " v. Ram Prasad, 189.
 " Singh v. Surendra, 149.
 " v. Tansukh, 46.
 Lachmi Narain v. Musaddi Lall, 106.
 Ladha Singh v. Must. Hukam Devi, 167.
 Ladharam v. Crown, 121.
 Lakhan Singh v. K. E., 247, 249.
 Lakhu Ram v. Amir Khan, 193.
 Lakmi Chand v. Sayed Hyder Shah, 5.
 Lakshman v. Amrit, 27, 30, 32, 116, 141.
 " Krishnaji, 150, 153.
 " Ramji, 243.
 " Sahu v. Gokhul, 153.
 Lal Bahadur v. Sheikh Gulam, 176.
 " Harihar v. Bisheshwar, 96.
 " Rajendra Singh v. Mahant Hulasdas, 172.
 " Mahomed v. Kallanus, 243.
 " Singh v. Crown, 138.
 Lala Dholan Das v. Ralya Shah, 187.
 " Gulab Chand v. Manni Lal, 105.
 " Lakmi Chand v. Sayed Shah, 5.
 Lalchand v. Ramrup Gir, 207.
 Laldas v. Kishoredas, 185.
 Lale v. K. E., 264.
 Lalji Dusadh v. K.E., 68, 70.
 Latafat Husain v. Lala Omkar Mal, 43.
 Le Hu v. Elahi Bux, 188.
 Legal Remembrancer v. Chema, 65.
 " Lalit, 51, 68.
 Lekal v. Crown, 101.
 Leslie, Ld. v. Sheill, 234.
 Lim Yam Hong v. Lam Choon & Co., 138.
 Llanover v. Homfray, 103.
 Lloyd v. Wilan, 49.
 Loolf Ali v. Pearce Mohun, 43.
 Lord George Gordon, 25.

- Lu Bein v. Queen-Empress, 62.
 Lu Gale v. Mg. Mo., 194.
 Lubek, *In re*, 7.
 Luchiram v. Radha Charan, 289, 290.
 Lucknow Imp., Trust v. P. L. Jaitly & Co., 54.
 M. F. Rego v. Emperor, 18, 87.
 Ma Ba v. Mg. Kun, 203.
 „ Hla Gywe v. Ma Thaik, 209.
 „ Mi v. Kallandar Amn.al (2), 142.
 „ Mo E. v. Ma Kun, 237.
 „ Ngwe Zan v. Mi Shwe Taik, 209.
 „ Po Khin v. Ma Shin, 113.
 „ Pyu v. Mg. Po Chet, 235.
 „ Shwe Pee v. Mg. San, 193.
 „ Thin Myaing v. Maung Gyi, 185.
 Madhavray v. Gulabbhai, 54.
 Madras Hindu M. B. P. Fund v. Raga-
 gava, 237.
 Maganlal v. K. E., 272.
 Mah Ili v. Mg. Sah Dun, 244.
 Mahabir Prasad v. Bishan Dayal, 202.
 „ „ v. Masiatullah, 197.
 „ Singh v. Rohini, 205, 227.
 Mahadeo v. King, 263, 265.
 „ Prasad v. Ghulam Mohammad, 95.
 „ v. Vyankammabai, 122.
 Mahadev v. Sundrabai, 45.
 Mahadeva v. Virabasaava, 141.
 Mahamad v. Hasan, 30, 32.
 Mahmamad v. Husan, 116.
 Maharaj Bhanudas v. Krishnabai, 106,
 156, 159.
 Maharaja of Kashmir v. Mohan Lal, 134.
 Maharani Janki Kuer v. Birj Bhikhan
 Ojha, 177.
 Maharu v. Khandu, 182.
 „ Surul v. Netai Charan, 167,
 168.
 Mahesh Chandra v. Manindra Nath,
 118.
 Maheshchandra v. Anandachandra, 211.
 Maheshwar v. Tikayet, 108, 107.
 Mahim v. Ram Dayal, 192.
 Mahomed v. Abdul, 301.
 „ Ali, v. Nazir Ali, 183.
 „ Ally v. Emp., 250.
 „ Golab v. Mahomed Sulliman,
 119.
 „ Mozuffer v. Kishori, 51.
 „ Solaiman v. Birendra Chan-
 dra, 227.
 „ Syedol v. Yeoh, 97, 234.
 Mairaj Fatima v. Abdul Wahid, 208.
 Makin v. Att. Genl., 41.
 Mali Muthu v. K. E., 113.
 Mam Chand v. The Crown, 295.
 Man Gobinda v. Sashindra, 268.
 Mangal Singh v. The Crown, 77.
 Mania v. Deorao, 217.
 Manik Borai v. Bani Charan, 211.
 Manikchand v. Krishna, 107.
 Manimchan Ghosh v. Emperor, 19, 280,
 292, 295.
 Manjaya v. Seshasethi, 262.
 Manmatha Kumar v. Exchange Loan
 Co., 234.
 Mannu Singh v. Umadat Pande, 214.
 Mansukh v. Trikambhai, 166, 168.
 Mano Mohun v. Mothura Mohun, 202.
 Mantubhai Mehta, 301.
 Mark D'Cruz v. Jitendra, 193.
 Markandelal v. Sitambharnath, 183.
 Markur, 111.
 Maroti v. Jagannathdas, 33, 116.
 Martand v. Amritrao, 194.
 Marudamuthu Padayachi, *In re*, 78.
 Masoqma Begam v. Mohammad Roza,
 215.
 Mata Din v. K. E., 56.
 Mathura v. K. E., 66.
 Mathura Singh v. Ram Rudra, 118.
 Maugham v. Hubbard, 297, 298.
 Mauladad Khan v. Abdul Sattar, 97.
 Maung Bin v. Ma Hlaing, 183.
 „ Chit v. Roshan, 176.
 „ Ko Gyi v. U. Kyaw, 182.
 „ Kyi v. Ma Ma Gale, 176.
 „ Kyin v. Ma Shwe La (13 Bom.
 L. R. 797), 182, 194.
 „ Kyin v. Ma Shwe La (20 Bom.
 L. R. 263), 182, 183.
 „ Lay v. King-Empress, 64.
 „ Lu Pe v. Maung Lu, 209.
 „ Min v. Maung On, 212.
 „ Mya v. Ma Tha Ya, 50,
 83.
 „ The King, 78.
 „ Myat Tun Aung v. Maung Lu
 Pu, 192.
 „ Nwe v. Maung Po Gyi, 203.
 „ Po Kin v. Maung Shwe Bya,
 185, 177.
 „ „ Nwe v. Ma Pwa, 111.
 „ San Min v. Maung Po Hlaing,
 172.
 „ „ Myin v. K. E., 62.
 „ Shwe Phoo v. Mg. Tun Thin, 183.
 „ Thit v. Maung Kyin, 209.
 „ Tun Sein v. Kotu, 177.
 „ Wala v. Maung Shwe Gon, 135.
 „ Wun v. Queen-Empress, 62.
 „ Ya Baing v. Ma Kyin, 209.
 Maya Singh v. Empress, 82.
 Mayalabahanam, 62.
 Mayandi Asari v. Sami Asari, 216.
 „ Chetti v. Oliver, 192.
 „ Mayen v. Alston, 205.
 Mazhar Ali v. Budh Singh, 208, 217.
 M'Combie v. Anton, 103.

- Medows v. Duchess of Kingston, 119.
 Meajan Matbar v. Alimuddi, 45, 47, 54.
 Md. Bakhsh v. Crown, 51.
 Md. Murtaza v. Abdul Rahman, 185.
 Meer Sujad Ali Khan v. Lalla Kasheerath, 273.
 Meer Usdoolah v. Beeby Imaman, 136.
 Megha Ram v. Makhan Lal, 199.
 Mehi Lal v. Ramji Das, 142.
 Memon Hajee v. Molvi Abdul, 257, 259.
 Menter v. Priest, 258.
 Mercantile Bank of India, Ltd., v. Central Bank of India, Ltd., 230.
 Messa v. Messa, 112, 113.
 Mewa Kuwar v. Rani Hulas Kuwar, 236.
 Mi Gywe v. Keshan Ram, 183.
 „ Hauk v. King-Emperor, 188.
 „ Myin v. King-Emperor, 129, 204.
 „ Myit v. Queen-Empress, 222.
 „ Ngwe Zan v. Mi Shwe Taik, 113.
 „ The U v. Queen-Empress, 224.
 Minu Sirkar v. Rheodoy Nath, 167.
 Mirza Akbar v. Emperor, 21, 25.
 „ Sajjad Ali v. Nawab, 213.
 Misir Bhairon v. Gopi Kunwar, 216.
 Mitchell v. A. K. Tennent, 184, 190.
 Mohamed Sugul v. King, 247, 248.
 Mohammad Akbar Khan v. Attar Singh, 189.
 „ Azim v. Special Manager, Court of Wards, 167.
 „ Husain v. Lala Hanoman, 182.
 „ Hussain Afqar v. Mirza Fakhrullah Beg, 7.
 „ Khan v. Sheo Bhikh Singh, 144, 171.
 „ Mehdi Hasan v. Mandir Das, 8, 228.
 Mohan Banjari v. K. E., 289.
 „ Manucha v. Nisar Ahmad, 213.
 Mohanlal v. K. E., 265.
 Mohansing v. Dalpatsing, 98.
 Mohendra Nath v. Emperor, 290, 304.
 Moher Sheikh v. Q. E., 260, 262.
 Mohori Bibee v. Dharmodas, 234, 235.
 Mohun Bibi v. Saral Chand, 305.
 Mohur Singh v. Ghuriba, 305.
 Moni Lal v. Khiroda Dasi, 306.
 Moola Cassim v. Moola Abdul, 208.
 Mosley's Case, 52.
 Motabhey v. Mulji Haridas, 189.
 Moti Chand v. Lalta Prasad, 150, 178.
 Mowji v. National Bank of India, 236, 238.
 Mrs. Alice Georgiana Pashand v. Mrs. Emma Bertha, 52.
 Mrs. M. F. Rego v. Emperor, 18, 87.
 Muhammad Ali v. Crown, 218.
 „ Allahdad v. Md. Ismail, 217.
 Muhammad Hamid-ud-din v. Shib Sahai, 240.
 „ Hussain v. Abdul Gaffoor, 242.
 „ Ibrahim v. Bibi Mariam, 171.
 „ Niaz-ud-din v. Md. Umar, 241.
 Muhammed Shaffi v. Q. E., 58.
 „ Shah v. Md. Said, 235.
 „ Shariff v. Bande Ali, 207.
 „ Suleman v. Hari, 141.
 „ Taqi Khan v. Jung Singh, 187.
 „ Yunus v. Emperor 77.
 „ Zafar v. Zahur Husain, 144.
 Mujibar Rahman v. Isub, 243.
 Mukerjee (S. N.) v. Q. E., 57.
 Mulchand v. Jamanbi, 227.
 „ v. Madho Ram, 181.
 Muliabi v. Garud, 234.
 Munchershaw v. The New Dhurumsey S. & W. Company, 91, 105, 259, 279.
 Muncyya, 81.
 Municipal Cor., of Bom. v. Secretary of State, 229, 234.
 Munnuswami Mudaliar v. Govindaraja, 192.
 Munshi Raghubir v. Rani Rajeshwari, 227.
 Murli Das v. Achut Das, 164.
 Musa v. Empress, 77.
 Must. Aishan Bibi v. Crown, 68.
 „ Bashiran v. Mohammad Husain, 51, 96.
 „ Bilas Kunwar v. Desraj Ranjit, 242, 243.
 „ Biro v. Atma Ram, 95.
 „ Gaura Dei v. Raja Mohammad Yasin, 236.
 „ Hana v. Lokumal, 144.
 „ Hira Bibi v. Ramdhan, 152.
 „ Jainath Kuar v. Danpal, 97.
 „ Jairut-ool-Butool v. Mussumat Hoseinee Begum, 226.
 „ Jamunia Pratap v. Emp., 66.
 „ Janat Bibi v. Ghulam Husain, 33.
 „ Kaniza v. Hasan Ahmad, 217.
 „ Masooma Begam v. Mohammad Raza, 215.
 „ Muliabai v. Garud, 234.
 „ Naina v. Gobardhan, 94.
 „ Nurai v. Empress, 58.
 „ Rajna v. Musaheb, 244.
 „ Shafiq-un-nissa v. Raja Shaban Ali Khan, 166, 167.
 „ Shahzadi Begum v. Syed Md. Quaim, 151.
 „ Zohra Jan v. Mt. Rajan Bibi, 187.

- Muthukumaraswami v. K. E., 220, 264, 295.
 Muzaffar Khan v. Crown, 279.
 Mylapore Krishnasami v. Emperor, 299.
 Myslwami, *In re*, 122.

 NABA KISHORE v. Paro Bewa, 211.
 Nabi Baksh v. Emp. of India, 248.
 Nadir v. Empress, 161.
 Nadirshaw H. Sukhia v. Perojshaw, 41.
 Nadjarian v. Trist, 242.
 Nafar Sheikh v. Emperor, 247.
 Nagaraja v. Sec. of State, 254, 255.
 Nageshwar Prasad v. Bachu, 152.
 Nagindas Sankalchand v. Bapalal, 243.
 Nai Muddin Biswas v. Emperor, 89.
 Naina Koer v. Gobardhan, 91.
 Nainsukhdas v. Goverdhandas, 143, 171.
 Nakul Chandra Sasadhar, 234.
 Namdev v. Dhondu, 185.
 Nana v. Shanker, 28.
 Nand Lal v. King Emperor, 222.
 Nanhak Ahir v. K. E., 265.
 Nanhku Singh v. Girja Bux, 177.
 Narasamma v. Veeraraju, 225.
 Narasimham v. Babu Rao, 141.
 Narayan v. Coop. Central Bank, 136.
 " Prashad v. K. E., 266.
 " Shrinivas, 207.
 " Venkatacharya, 45, 237.
 Narayana v. K. E., 280.
 " Rao v. Venkatappayya, 225.
 " Row v. Dharmachar, 211.
 Narayanaswamy(S). v. J. Rodrigues, 188.
 Narendra r. Ram Govind, 216, 217.
 " Lal v. Jogi Hari, 226.
 " Narain v. Bishun, 146.
 Naresh Chandra v. Emp., 66, 70.
 Narhari v. Ambabai, 93.
 Narki v. Lal Sahu, 207.
 Naro Vinayak v. Narahari, 28.
 Narsingdas v. Rahimanbai, 235.
 Narsingerji v. Parthasarathi, 194.
 Narsingh Das v. Gokul Prasad, 101.
 " Dyal v. Ram Narain, 28.
 Narsi v. Parshotam, 172.
 Nasir Din v. Crown, 15.
 Natal Land Co. v. Good, 116.
 Natha Singh, 21.
 Nathusa v. Muhammad Siddique, 214.
 National Bank of Upper India v. Bansidhar, 182.
 Navalbhai v. Shivbai, 187.
 Nawab Howladar v. Emperor, 252.
 " Zakia Begam v. Luck. Imp. Trust, 236.
 Nawal Kishore v. King. Emp., 224.
 Nazir Abbas v. Raja Ajamshah, 51.
 " Ahmed v. Crown, 253.
 " " v. K. E., 51.

 Nazir Khan v. Ram Mohan, 174, 175.
 Neale v. Samples, 168.
 Neharu v. Emperor, 19, 66.
 Nga Aung Thein v. Crown, 81.
 " Cho v. Mi Se Mi, 197.
 " Don Be v. Crown, 222.
 " Kywet v. Queen-Empress, 222.
 " Nyein v. K. E., 290.
 " Po Kauk v. K. E., 79.
 " " Kyaw v. Queen-Empress, 58.
 " " Mya v. Queen-Empress, 79.
 " Po So v. K. E., 38.
 " " Tok v. K. E., 77.
 " " Yin v. K. E., 93.
 " Pye v. King-Emperor, 59.
 " San Baw v. Crown, 160.
 " " Bwin v. Q. E., 38.
 " " Nyein v. K. E., 79.
 " " Ya v. K. E., 66.
 " Shwe Hman v. Q. E., 38.
 " " Tan v. Queen-Empress, 67.
 " Tha Nyan v. Queen-Empress, 7.
 " Tun E v. Mi Chon, 216.
 " Yauk v. Queen-Empress, 223.
 Nihal Chand v. Teju, 209.
 " Singh v. Jiwanda, 209.
 Niharbala Devi v. Shashadhar, 235.
 Nikka v. Crown, 264.
 Nilakanta v. Imamsahib, 31.
 Ningawa v. Bharmappa, 43, 90, 91, 93, 225.
 Nirbhay Nath v. Emperor, 56.
 Nirmaljeeban Ghosh v. Emperor, 264.
 Nisa Chand v. Kanchiram, 211.
 Nisar Ahmed v. Mohan Manucha, 213.
 Nistarini v. Nundo Lall, 119, 294.
 Nockabee v. Com., 88.
 Noor Ahmad v. Emp., 201, 224.
 " Bux v. The Empress, 275, 304.
 North Eastern Ry. Co. v. Hastings, 196.
 Nurai v. The Empress, 58.
 Nural Amin v. Emperor, 40, 41.
 Nur-ul-Hasan v. Muhammad Hasan, 217.

 O'ROURKE v. Darbishire, 258.
 Oriental G. S. L. A. Co. v. Narasimha, 96, 135.
 Over v. Over, 135.
 Oziullah v. Beni Madhab, 159.

 P. v. P., 217.
 Pakala Narayana Swami v. K. E., (41 Bom. L. R. 428), 61, 66, 87, 88.
 " Swamy v. K. E., (17 Pat. 15), 51, 154.
 Pal Singh v. Jagir, 215, 217.
 Palakdhari v. Manners, 306.
 Palani v. Sethu, 215, 217.
 Palanivelu (A. V.) v. Neelavati, 214.
 Panchanan Gogai v. Emp., 289.

- Panchanathan, *In re*, 64.
 Pandappa v. Shivilingappa, 168.
 Pandit Chandra Dhar v. Dy. Commr. Lucknow, 254, 255.
 Pandurang v. Markandeya, 238.
 Papamma v. Venkayya, 185.
 Param Singh v. Lalji, 232.
 Paramasiva v. Krishna Pillay, 149.
 Paranjpe, v. Kanade, 119.
 Parma Nand v. Airapat Ran., 199.
 Parshottam v. Sec. of State, 235.
 Parsotam Gir v. Narbada Gir, 238.
 Partab Bahadur Singh v. Raja Rajgan Maharaj, 43.
 Partap Singh v. Crown, 57, 299.
 Parvatibayamma v. Ramkrishna Rau, 241.
 Patel Kilabhai v. Hargovan, 243.
 Pathammal v. Syed Kalai, 180, 199.
 Peddabba Reddi v. Varoda Reddi, 261, 262.
 Pemraj v. Narayan, 209, 210, 212.
 Pereira v. Emperor, 62.
 Periyaswami Moopan, 76, 77.
 Perumal Chettiar v. Kamakshi, 175.
 " Mudaliar v. South Indian Rly., Co., 121.
 Philipson v. Chase, 140.
 Pickard v. Sears, 229.
 Pir Baksh v. Jhanda Mal, 209.
 " Shah v. Gulab Shah, 145.
 Po Gaung v. Ma Shwe Bwin, 107.
 " Sin v. King-Emperor, 62.
 Pokal Gungayah v. Ismail, 181.
 Pokar v. Crown, 145.
 Ponnuswami Goundan v. Kalyanasundara, 147.
 Potram c. Emperor, 77.
 Prabhakar v. Sarubai, 95.
 Pramathachandra Kar v. Bhagwandas, 19.
 Pramatha Nath v. Dwarka Nath, 174.
 " " Pramanik v. Nirode Chandra, 156.
 Premchand Dowlatram, *In re*, 276.
 Preonath Shaha v. Madhu Sudan, 183.
 Price v. Manning, 289.
 Probodh Lal v. Harish Chandra, 238.
 Provincial Govt. C. P. v. Champalal, 206.
 " v. Raghuram, 224.
 Public Prosecutor v. Venkatrama Naidu, 299.
 " " v. Thippayya, 134.
 Punjab v. Natha, 207.
 " National Bank v. Mrs. S. B. Chaudhry, 194.
 Punnayyah v. Viranna, 118.
 Puransingh v. K. E., 66.
 Purnananda, *In re*, 20.
 Purnmeshur v. Birjo Lal, 211.
 Purnananda Das v. Emp., 264.
 Purnima Debya v. Nand Lal, 32.
 Pym v. Campbell, 190.
 QUEEN'S Case, 110.
 Queen v. Belat Ali, 77.
 " Brown, 292.
 " Croydon, 58.
 " Francis, 41.
 " Gopal Doss, 250, 261, 262, 282.
 " Holmes, 285.
 " Hurribole, 61, 62, 63, 306, 307.
 " Inhabitants of Bedfordshire, 94.
 " J. Macdonald, 22.
 " Keshub, 77.
 " Mookta Singh, 250.
 " Ram Dutt, 99.
 " Rowton, 127.
 " Saddler's Company, 119.
 " Sageena, 73.
 " Sewa Bhogta, 247.
 " Thompson, 56.
 Queen-Empress v. Abdullah, 20, 21, 87, 88, 186.
 " Arumugam, 156.
 " Babu Lal, 43, 55, 60, 65, 66, 70.
 " Bastin, 224, 263.
 " Baswanta, 56, 58, 80, 101.
 " Bepin Biswas, 294.
 " Bhairab Chunder, 51.
 " Bhalu, 206.
 " Bharna, 3, 4.
 " Bhima, 62, 64.
 " Chagan Dayaram, 264.
 " Chinna, 76.
 " Dan Sahai, 279.
 " Donaghue, 251, 252.
 " Dosa Jiva, 82.
 " Durga Sonar, 161.
 " Gangia, 80.
 " Ganu Sonba, 101, 262.
 " Gharya, 80.
 " Gobardhan, 256.
 " Grees Chunder, 105.
 " Hari Lakshman, 305.
 " Ishri Singh, 296, 305.
 " Jadub Das, 81.
 " Jagrup, 55, 74.
 " Jai Singh, 64.
 " Javecharam, 61, 64, 263.
 " Kamalia, 71.
 " Khandia, 7, 79.
 " Krishnabhat, 266.
 " Lakshmayya, 76.
 " Lakshmya, 64.

- Queen-Empress v. Lal Sahai, 247.
 „ Maganlal and Mctilal, 264.
 „ Mahabir, 80.
 „ Maiku Lal, 80.
 „ Manikam, 251.
 „ Mannu, 278, 281, 298.
 „ Maru, 247.
 „ Mathews, 61.
 „ Mona Puna, 249.
 „ Moss, 262.
 „ Nagla Kala, 62, 64.
 „ Nana, 20, 55, 61, 65, 69.
 „ Narayan, 56.
 „ Nga Paw Lon, 59.
 „ „ Swe, 263.
 „ „ Thet, 61.
 „ Ningappa, 266.
 „ Nirmal Das, 79.
 „ Nur Mahomed, 21, 37, 76.
 „ Pahuji, 75.
 „ Paltu, 75.
 „ Pirbhu, 75.
 „ Ram Saran, 265.
 „ „ Sewak, 247.
 „ Raman, 81.
 „ Ramchandra, 103, 306, 307.
 „ Rangli, 80.
 „ Salemuddin, 62.
 „ Sami, 21, 223.
 „ Sangappa, 56.
 „ Sundar Singh, 64.
 „ Tatya, 62, 61.
 „ T. Burke, 102.
 „ Timmal, 205.
 „ Tribhovan, 44, 62.
 „ Tulja, 3.
 „ Vajiram, 37.
 „ Viran, 160.
 „ Zawar Husein, 274.
 R. D. SETHNA v. Mirza Mahomed, 28.
 R. Leslie, Ltd., v. Sheill, 234.
 R. M. P. A. L. Chettiar Firm v. Ko Maung Gale, 240.
 Radha Jeebun v. Taramonee, 290.
 „ Kishan v. Bhore Lal, 234.
 „ „ v. Kedar Nath, 101.
 „ Kishun v. K. E., 62.
 Radhakant v. Abhoychurn, 173.
 Radhakissen Clamaria v. Durgaprasad, 190.
 Radhamohan Thakur v. Bipin Behari, 187.
 Radhe Shiam v. Behari Lal, 234.
 Raggha v. Emperor, 54, 57.
 Raghubir Singh v. Rani Rajeshwari, 227.
 Raghubir Singh v. Thakurain Sukhraj, 165.
 Raghunath v. Varjivandas, 203.
 „ Singh v. K. E., 116.
 Raghunathji v. Varjiwandas, 213.
 Raghuni Singh v. Empress, 298.
 Rahiman v. Elahi Baksh, 185, 199.
 Rahimatbai v. Hirbai, 125.
 Rahmat Ali v. Mt. Allahdi, 216.
 „ „ v. Mt. Babu, 114.
 Rahmat-ullah v. Sec. of State, 108, 162.
 Rai Dirgaj v. Beni Mahto, 106.
 „ Jagatpal v. Raja Jogeshwar, 96.
 Raj Fateh Singh v. Baldeo, 45.
 „ Kumar Jagannath Prasad v. Syed Abdullah, 230.
 „ Kumari v. Bama Sundari, 117.
 „ Mal v. Empress, 44.
 „ Mangal v. Mathura, 152.
 Raja Goundan v. Raja Goundan, 98.
 „ Lal Bahadur v. Sheikh Gulam, 176.
 „ Partab Bahadur Singh v. Raja Rajan Maharajah, 43.
 „ Ram v. Thakur Rameshwar, 152.
 „ Sri Sri Jyoti Prasad v. Bharat Shah, 33.
 Rajagopal, 78, 81, 224, 264.
 Rajah of Kalahasti v. Venkatadri Rao, 185.
 Rajaram v. Nanchand, 210.
 Rajendra Prasad v. Gopal Prasad, 169.
 Rajendra Singh v. Mahant Hulasdas, 172.
 Rajib Panda v. Lakhan Sendh, 117.
 Rajna v. Musaheb, 244.
 Rajnarain v. U. L. Ass. Co., 235.
 Rakha v. The Crown, 295.
 Ram Bahadur v. Ajjodhya Singh, 149.
 „ Chand v. Bhana Mal, 209.
 „ „ v. Chhunnu Mal, 202.
 „ „ v. Hanif Sheikh, 274.
 „ Chandra v. Jogeshwar Narain, 97.
 „ Das v. Official Liquidator, Cotton Gng. Co., 227.
 „ Gopal v. Aipna, 148.
 „ „ v. Tulsi Ram, 171.
 „ Kishun v. Niranjun, 30, 31.
 „ Kumar v. King-Emperor, 272.
 „ Lal v. Kanai Lal, 232.
 „ „ v. Tula Ram, 111, 117.
 „ Lochan Misra v. Pandit Harinath Misra, 141.
 „ Narain v. Durga Dat, 113.
 „ „ v. Monee Bibee, 98.
 „ Naresh v. Chirkut, 166.
 „ Nath v. Crown, 57.
 „ Prasad v. Raghunandan, 139, 141.
 „ Pranan v. Ram Narain, 27, 32.
 „ Sundar Mal v. Col. of Gcrakhpur,

- 181, 186.
 Rama Rao v. Venkataramayya, 157.
 Ramabai v. Ramchandra, 202.
 Ramalinga v. Kottaya, 107.
 Raman (G. V.) v. Emperor, 270.
 " v. Secretary of State, 13.
 Ramanamma v. Appalanarasayya, 111.
 " v. Viranna, 213.
 Ramanandan Prasad v. Chandradip, 244.
 Ramanathan v. Ranganathan, 237.
 Ramani Pershad v. Mahant Adaiyar, 51.
 Ramasami v. Appavu, 30.
 Ramaswami Goundan v. Emp., 223, 263.
 Ramchandra v. Balaji, 209.
 " v. Narayan, 210.
 " v. Vinayak, 210.
 " Sau v. Kailashchandra, 135.
 Ramendramohan Tagore v. Keshab-chandra, 174.
 Ramesh Chandra v. Emperor, 161, 306.
 Rameshwar v. K. E., 205.
 Ramgobind Prasad v. Gulabchand, 103.
 Rami Reddi, 100, 102, 103.
 Ramjibun v. Oghore Nath, 190, 269.
 Ramkishun, 279.
 Ramlal Chandra v. Govinda, 192.
 Ramnandan Prasad v. Chandradip, 186.
 Ramprasad v. K. E., 66, 220.
 Rampyarabai v. Balaji, 92, 106.
 Ramrao v. Dattadayal, 231.
 Ramsarup Singh v. K. E., 223.
 Ranchhod v. Ravjibhai, 175.
 Ranchhoddas v. Bapu, 30, 31.
 Ranchhodlal v. Sec. of State, 235.
 Ranga v. The Crown, 20, 87.
 Rango v. Mudiyeppa, 207.
 Rangubai v. Govind, 180.
 Rani Chandra v. Chaudhuri, 83.
 " Mewa Kuwar v. Rani Hulas Kuwar, 236.
 Rao Bhimsingh v. Fakirchand, 149.
 Rasul Bhai v. Lal Khan, 262.
 Rattan Dhanuk v. K. E., 265.
 Rebati Mohan Chakravarti v. Emp., 224.
 Re Annavi Muthiriyar, 2, 102.
 " Bati Reddi, 76.
 " Jaladu, 4.
 Redford v. Birley, 99.
 Reg. v. Arjun Megha, 279.
 " Avery, 258.
 " Budhu Nankur, 265.
 " Cockerott, 285.
 " Cotton, 42.
 " Fata Adaji, 89.
 " Gallagher, 224.
 " Garner, 88.
 " Gillis, 57.
 " Gray, 40.
 " Hanmanta, 91, 105, 248.
 Reg v. Jacob, 57.
 " Jora Hasji, 69.
 " Kalu Patil, 75.
 " Malappa, 294.
 " Mallory, 21, 49.
 " Navroji, 57, 59, 306.
 " Parbhudas, 26, 27, 28, 36, 37.
 " Roden, 42.
 " Sakharam, 29, 292, 303.
 Rego v. Emperor, 18, 87.
 Rex v. Baker, 57, 285.
 " Baskerville, 224.
 " Butterwasser, 129.
 " Clarke, 285.
 " Clews, 18.
 " Derrington, 74.
 " Hilditch, 267.
 " Martin, 285.
 " Parratt, 60.
 " Shaw, 74.
 " Spilsbury, 73.
 " Thomas, 74.
 Riazulnisa Begam v. Lala Puran Chand, 150.
 Richard Taylor v. Rajah of Parlakimidi, 180.
 Rickman v. Carstairs, 195.
 River Steamer Co., *In re*, 53.
 Rivett-Carnac v. New Mofussil Co., 235.
 Rochia Mohato, *In re*, 90, 103, 104.
 Roda Framroj v. Kanta Varjivandas, 150.
 Rozario v. Ingles, 216, 287.
 Rudolf Stallmann, *In re*, 2.
 Rudragouda v. Basangouda, 168.
 Rungo Lal v. Abdool Guffor, 208.
 Rup Chand v. Sarveswar, 233, 245.
 " Kishor v. Patrani, 95.
 Russell v. Russell, 215.
 S. N. MUKERJEE v. Queen-Empress, 57.
 S. Narayanaswamy v. J. D. Rodriguez, 188.
 Sabran Sheikh v. Odoy Mahto, 30.
 Sachinder Rai v. K. E., 201.
 Sadu v. Empress, 103.
 Sah Lal v. Indrajit, 187, 191.
 Sahasrabudhe (D.G.) v. Kilachand, 112.
 Sahadeo v. Namdeo, 191.
 Sahib Din v. Sri Dhanush Dhareji, 193.
 Said-un-nissa Bibi v. Ruquaiya, 107.
 Saiyid Mohd. v. Saiyid Ainul, 239.
 Sajjad Ali v. Nawab, 213.
 Sajjan Singh v. Crown, 101.
 Sakalchand v. Sundarlal, 209.
 Saleh v. Mt. Bakhtawar, 4.
 Salimantul-Fatima v. Koylashpati, 148.
 Samar Dasadh v. Juggul Kishore, 106.
 Samiruddin, *In re*, 89, 298.
 Sangam Lal v. Mt. Sikandar, 171.

- Sangira v. Ramappa, 186.
 Sankappa Rai v. Koraga, 100.
 Santaya v. Savitri, 197.
 Santokhi Beldar v. K. E., 56, 57, 53.
 Saraswati v. Dhanpat Singh, 106.
 Sarat Chandra Kar v. Emperor, 89.
 " Chunder v. Gopal Chunder, 229,
 235, 236.
 Sardarmal v. Aranvayal, 118.
 Sardarmiya v. Crown, 73.
 Sarfaraz Khan v. Mst. Rajana, 96.
 Sariatullah v. Pran Nath, 125.
 Sarojekumar Chakrabarti v. Emperor,
 28, 129.
 Sarojini Dasi v. Hari Das, 154.
 Sarthakram v. Nundo Lall, 119.
 Sasi Sekhar v. Maharaja Bir, 226.
 Satis Chunder v. Mohendro Lal, 98.
 Satish Chandra v. Jogendranath, 151.
 " Seal v. Emp., 70, 86.
 Satya Charan Manna v. Emperor, 222.
 Satyanarayana, 266.
 Sayaji Rao (Sir) v. Madhavrao, 172.
 Saya Kye v. Queen-Empress, 25.
 Sayed Mohammad Hussain Atquar v.
 Mirza Fakrulla, 7.
 Scarf v. Jardine, 238.
 Sec. of State v. Chimanlal, 107, 108, 162.
 " Dwarka Prasad, 206.
 " Sayed Ahmed, 116.
 " Tatyasaheb, 239.
 Seethapati Rao v. Venkanna, 107.
 Seethayya v. Subramania, 168.
 Seneviratne v. King, 201.
 Seodayal v. Joharmull, 158.
 Serajuddin v. Isab, 194.
 Seshapani, *In re*, 61.
 Sethna (R. D.) v. Mirza Mahomed
 Shirazi, 28.
 Sethu v. Palani, 217.
 Seton v. Lafone, 236.
 Shafiq-un-nissa v. Shaban Ali, 166, 167.
 Shahzadi Begum v. Syed Md. Quaim,
 151.
 Shaikh Muhammad Ibrahim v. Bibi
 Mariam, 171.
 Shailendranath v. Girijabhushan, 168.
 Sham Lall v. Amarendra Nath, 120.
 Shama Charan v. Abhiram Goswami,
 169.
 Shama Churn v. Abdul Kabeer, 211.
 Shambati v. Jago, 213.
 Shamdas v. Gurumukhsing, 116.
 Shamdasani v. Sir Hugh Cocke, 157.
 Shams-ul-Jahan v. Ahmed Wali, 182.
 Shamu Patter v. Abdul Kora, 149.
 Shankar v. Jagannath, 243.
 " Kesheo, 31, 33.
 " Ramji, 124.
 Shanta (Bai) v. Umrao Amir, 262.
 Shantabai v. Narayan Rao, 243.
 Sharaf Ali Khan v. Jogendra, 173.
 Sharif v. Crown, 78.
 Shaw v. Jones-Ford, 242.
 Sheikh Akbar v. Sheikh Khan, 173, 174.
 " Ala Bakhsh v. Thakur Durga,
 227.
 " Bodha v. Sukharam, 167.
 " Ibrahim v. Parvati Hari, 53.
 " Muhammad v. Ramdat, 188.
 " Rashid v. Hussain Baksh, 241.
 Sheo Karam v. Prabhu Narain, 245.
 " Nath Prasad v. Sarju Nonia, 175.
 " Prasad v. Gobind, 184, 191.
 " Ratan v. Jagannath, 151.
 Sheonandan Singh v. Jeonandan, 91.
 Sheonarain Singh v. K. E., 82.
 Sheoparsan v. Narsingh, 213.
 Sheoratan v. K. E., 82.
 Sher Singh v. Crown, 264.
 Shere Singh v. Empress, 44.
 Shewaram v. Crown, 206.
 Shivabhai v. Emp., 89.
 Shivgangawa v. Basangouda, 214.
 Shorilal v. Damodar Das, 238.
 Shoshi Bhooshun v. Girish Chunder, 105.
 Shridhar v. Babaji, 237.
 Shri Dolatsinghji Jaswantsinghji v.
 Khachar Mansur, 83.
 Shrikisan v. Jagoba, 107.
 Shripad Gauda v. Govind, 120.
 Shwe Kin v. King-Emperor, 294.
 " Yat Aung v. Da Li, 47.
 Shyam Lal v. Lakshmi, 150.
 Shyama Charan v. Surya Kanta, 211.
 Shyamanand Das v. Rama Kanta, 96.
 Shyamdas Kapur v. Emperor, 202.
 Sibti Muhammad v. M. Hameed, 217.
 Sidik v. Crown, 16, 122.
 Sikandar Miyan v. Emp., 201.
 Simla Bank Corp., v. Ball, 194.
 Singh (B. B.) v. K. E., 70, 71.
 Sir Mohammad Akbar Khan v. Attar
 Singh, 189.
 Sir Sayaji Rao v. Madhavrao, 172.
 Siraj Fatma v. Mahmud Ali, 118.
 Sirdarni Dharam Kour v. Randhir
 Singh, 241.
 Sital Singh v. Emperor, 77.
 Sitanath Das v. Mohesh Chunder, 102.
 Sitaram v. Sadhu, 210.
 Sladen, *In re*, 163.
 Sm. Nistarini Dasee v. Rai Nundo, 119,
 294.
 Sogalmuthu Padayachi v. K. E., 71.
 Sohrai Sao v. K. E., 290.
 Solomon v. Herne, 49.
 Somabhai v. Kalyanbhai, 175.
 Sona Meah v. King-Emperor, 221.
 Sonaram Mahton v. K. E., 68, 70.

- Soney Lal Jha v. Darabdeo Narain, 90,
 92, 93.
 Soojan Bibee v. Achmut Ali, 104.
 Sowdamonee v. A. Spalding, 190.
 Special Officer, Court of Wards v. Tir-
 beni, 168.
 Spittle v. Walton, 248.
 Sreemati Purnima Debya v. Nand Lall,
 32.
 Sreemutty Mohun v. Sarat Chand, 305.
 Sri Ghansham Lalji v. Ram Narain, 190.
 „ Krishan Datt v. Ahmadi, 31.
 „ Prasad v. Special Manager, Court
 of Wards, 155, 166, 168.
 „ Ram v. Sobha Ram, 184.
 „ Sri Jyoti Prasad v. Bharat Shah, 33.
 Srimati Bhaba Sundari v. Ram Kamal,
 192.
 Srinivas v. Emp., 224.
 Sris Chandra v. Rakhlanand, 2.
 Stallmann (Rudolf), *In re*, 2.
 Stringer's Estate, *In re*, 242.
 Subbu Naidu v. Varadarajulu, 178.
 Subhani v. Nawab, 31.
 Subramania Ayyar v. Raja Rajeswara
 Dorai, 195.
 Subramanian v. Lutchman, 177.
 Subramanyan v. Paramaswaran, 31.
 Sudama v. K. E., 87.
 Sudhist Lal v. Mussammat Sheobarat,
 213.
 Sugachand v. Mangibai, 125.
 Sujad Ali Khan v. Lalla Kasheenath,
 273.
 Sukhan v. Crown, 67, 70, 71.
 Sukh Dial v. Mani Ram, 173.
 Sukhlal v. Jetha, 192.
 Sumsuddin v. Abdul, 213.
 Sundar v. Parbati, 212.
 „ Kuar v. Chandreshwar, 146.
 Sunitabala v. Dharasundari, 213.
 Superintendent and Remembrancer of
 Legal Affairs, Bengal v. Bhaju, 55, 66,
 70.
 Suppu v. Govindcharyar, 3.
 Surajpalsingh v. Crown, 263, 265.
 Surat Dhobni, *In re*, 15.
 Surender Nath v. Brojo Nath, 31.
 Surendra Krishna Roy v. Mirza Md.
 Syed, 144, 147, 167.
 Surendranath Das v. Emperor, 201.
 Suresh Chandra v. Emperor, 122.
 Surjan v. Sardar, 96, 98.
 Sursingji Dajiraj v. Sec. of State, 255.
 Swadeshi Mills Co. v. Juggi Lal, 121.
 Sweeney v. Sweeney, 215, 216,
 246.
 Syad Pir Shah v. Gulab Shah, 145.
 Syamo Maha Patro, *In re*, 20, 77, 81.
 Syed Zaharul v. Mahadeo, 151.
 TAJ MAHMAD v. Crown, 177.
 Tajuddin v. Govind, 168.
 Talakchand v. Atmaram, 184.
 Talewar Singh v. Bhagwan, 306.
 Tani v. Rikki Ram, 207.
 „ Mahesha v. Sec. of State, 186.
 Tara Chand v. Baldeo, 199.
 „ Kumari v. Chandra, 213.
 Taruck Nath v. Jeamat Nosya, 298.
 Taule v. K. E., 58.
 Taylor (Richard) v. Rajah of Parla-
 kimidi, 180.
 Tehilram v. Kashibai, 238.
 Tek Chand v. Mt. Gopal, 235.
 Teka Ahir v. K. E., 130.
 Tepu Khan v. Rajani Mohan, 27, 28,
 30, 32.
 Tha Dwe v. A. L. V. S. Allagappa, 206.
 Thakur Amjal v. Nawab Ali, 215.
 „ Basant Singh v. Mahabir, 210.
 „ Fatesingji v. Bamanji, 177.
 Thayammal v. Muthukumaraswami, 151.
 The Att.-Gen. v. Drumond, 19.
 „ Brit. India Steam, etc., Co. v.
 Hajee, 208.
 „ Collector of Benares v. Sheo Pra-
 sad, 3.
 „ „ Gorakhpur v. Palak-
 dhari, 13, 30, 31, 110,
 116, 270.
 „ „ Jaunpur v. Jamna, 255.
 „ Crown v. Ibrahim, 280.
 „ „ Mst. Soma, 4.
 „ „ Saifal, 222.
 „ Dy. Commr. of Bara Banki v.
 Ram Parshad, 91, 105.
 „ Emperor v. Radhe Halwai, 161.
 „ Empress v. Girish Chunder, 301.
 „ Englishman, Ltd. v. Lajpat Rai,
 134, 158.
 „ King v. Nga Myo, 265.
 „ „ Parker, 294.
 „ Legal Remembrancer v. Chema,
 65.
 „ Lucknow Imp. Trust v. P. L. Jait-
 ley & Co., 54.
 „ Maharaja of Kashmir v. Mohan
 Lal, 134.
 „ Natal Land & Co., v. Good, 116.
 „ Punjab National Bank v. Mr. S. B.
 Chaudhry, 194.
 „ Queen's Case, 110.
 „ Queen v. Brown, 292.
 „ „ Croydon, 58.
 „ „ Francis, 41.
 „ „ Gopal Doss, 250, 261,
 262, 282.
 „ „ Holmes, 285.
 „ „ Inhabitants of Bedford-
 shire, 94.

- The Queen v. J. Macdonald, 22.
 " " Keshub, 77.
 " " Mookta Singh, 250.
 " " Ram Dutt, 99.
 " " Rowton, 127.
 " " Sadler's Co., 119.
 " " Thompson, 56.
 " Queen-Empress v. Gress Chunder, 105.
 " Sec. of State v. Dwarka Prasad, 206.
 " University of the Punjab v. Jaswant Rai, 254.
 Thein Myin v. K. E., 307.
 Thet She v. Maung Ba, 146.
 Thiagaraja Bhagavathar, 78, 264.
 Tirathpathi v. Ranjit, 207.
 Tirlok Nath v. Lachmin Kunwari, 216.
 Tollemache, *In re*, 93.
 Trailokia Nath v. Shurno, 169.
 Trailokyanath Das v. Emperor, 10, 111, 116.
 Tribhuwan Ojha v. Ramchandra, 297.
 Trimbak v. Kashinath, 227.
 Tukaram v. K. E., 252, 253.
 Tula Ram v. Shyam Lal, 134.
 Tulshiram v. Chunnial, 125, 214.
 Tulsi Ram v. Ram Saran, 145.
 Turab v. K. E., 20, 55, 64.
 Tyagaraja Mudaliar v. Vedathanni, 171, 181, 186, 188.
 U. Nyo v. Ma Shwe Meik, 209.
 Udebhan v. Vithoba, 203.
 Udraj Raj v. Rani Bahal, 238.
 Ulasmoni v. Sukhomani, 191.
 Ulfatun-nissa v. Hosain Khan, 177.
 Umra v. Mahammad Hayat, 215.
 University of the Punjab v. Jaswant Rai, 254.
 Unkar Nath v. Mithu Lal, 201.
 Uttam Singh v. Hukam Singh, 152.
 VAIKUNTARAMA v. Authimoolam, 234.
 Vallabhdas v. Pranshankar, 164.
 Valla Hataji v. Sidoji Kondaji, 195.
 Varada v. Krishnasami, 144.
 Vasta v. Secretary of State, 211.
 Vasudev Daji v. Babaji, 243.
 Veera Koravan, *In re*, 275.
 Veeramma v. Chemma Redi, 207.
 Veerappa v. Ramasami, 148, 151.
 Velliah Kone v. King-Emperor, 296.
 Venkatachella v. Sampathu, 253, 300, 301.
 Venkata Chetty v. Aiyanna Goundan, 243.
 Venkata Sheshayya v. Kotiswara Rao, 118.
 Venkatappa v. Subba Naik, 118.
 Venkataramayya v. Seshamma, 98.
 Venkatasami v. The Queen, 75, 79.
 " v. Venkatreddi, 30.
 Venkatasubba Reddi, 87.
 Venkatasubbiah v. Govinda Rajulu, 172.
 Vertannese v. Robinson, 242, 243.
 Vishnu v. Ganesh, 190.
 " Krishnan, 235, 236.
 " New York Ins. Co., 258.
 " Ram v. Nathu, 149, 153.
 Vithabai v. Malhar, 207, 239.
 Vithoba v. Narayan (1883, P. J. 262), 209.
 " Narrayan [1942] Nag. 592, 182.
 " v. Shrihari, 167.
 Vithu v. Thakurdas, 105.
 Voke's case, 42.
 Vythilinga v. Venkatachela, 30.
 WA THA v. Pe Hlaw, 210.
 Wadhawa v. Fattah Muhammad, 127.
 Wafadar Khan v. Queen-Empress, 306.
 Wali Ahmad v. Ajudhia Kandu, 211.
 Walker v. Wilsher, 53.
 Walter Mitchell v. A. K. Tennent, 184, 190.
 Walvekar v. Emp., 226.
 Wazir v. Queen-Empress, 38, 117.
 " Singh v. Jai Gopal, 202.
 Weston v. Peary Mohan, 11, 228, 255.
 Wiedemann v. Walpole, 21.
 Wild's case, 60.
 William Barnard, 23.
 Williams v. Bridges, 49.
 Womes Chunder v. Chundee Churn, 306.
 Womesh Chunder v. Shama Sundari, 144.
 Wright v. Tatham, 94.
 X X X v. Ma Son, 215.
 YACUBKHAN v. Guljarkhan, 150, 151.
 Yasin v. King-Emperor, 81.
 Yusuf v. Jyotischandra, 242.
 ZAHURI Sahu v. K. E., 155.
 Zakia Begam v. Luck. Improvement Trust, 236.
 Zakeri Begum v. Sakina, 92.
 Zohra Jan v. Mt. Rajan Bibi, 187.

THE LAW OF EVIDENCE.

THE INDIAN EVIDENCE ACT

(ACT I OF 1872)

Received the G.-G.'s assent on March 15, 1872.

WHEREAS it is expedient to consolidate, define and amend the
Preamble, law of Evidence ; It is hereby enacted as follows :—

COMMENT.—The object of the preamble of an Act is to indicate what, in general terms, was the object of the Legislature in passing the Act. The preamble here shows that the Indian Evidence Act is not merely a fragmentary enactment, but a consolidatory one.

The Act reduces the English law of evidence to the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India. It is, in the main, drawn on the lines of the English law of evidence.

The word 'evidence' is derived from the Latin word *evidens evidera*, which means "to show clearly ; to make clear to the sight ; to discover clearly ; to make plainly certain ; to ascertain ; to prove."

Before the passing of the Indian Evidence Act, the principles of English law of evidence were followed by the Courts in India in presidency-towns. In the mofussil Muhammadan law of evidence was followed for some time by British Courts, but subsequently various regulations, dealing with principles of evidence, were passed for the guidance of mofussil Courts. Act II of 1855 partially codified the law of evidence. But it did not affect the practice in vogue in mofussil Courts. In 1868 Mr. (afterwards Sir Henry Sumner) Maine prepared a Draft Bill of the Law of Evidence, but it was abandoned as not suited to the country. In 1871 Mr. (afterwards Sir James Fitz-James) Stephen prepared a new draft which was passed as Act I of 1872.

One great object of the Evidence Act is to prevent laxity in the admissibility of evidence, and to introduce a more correct and uniform rule of practice than was previously in vogue. The Act is not intended to do more than prescribe rules for the admissibility or otherwise of evidence on the issue as to which the Courts have to record findings.

The main principles which underlie the law of evidence are—

- (1) evidence must be confined to the matter in issue ;
- (2) hearsay evidence must not be admitted ; and
- (3) best evidence must be given in all cases.

The Indian Evidence Act does not contain the whole law of evidence applicable to British India. Besides the Evidence Act there are other Acts of the Indian Legislature and Statutes passed by the Parliament which make specific provisions on matters of evidence and which are applicable to British India. Where, therefore, the records of a German Court were not authenticated in accordance with the Indian Evidence Act, but in the manner prescribed by the English Extradition Act, which is applicable to this country, the records were held admissible under it.¹

Once a statute is passed, which purports to contain the whole law, it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute, because it appears to him that the irregular evidence would throw light upon the issue. The principles of exclusion of evidence adopted by the Act must be applied strictly and cannot be relaxed at the discretion of the Court.²

PART I.

RELEVANCY OF FACTS.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called the Indian Evidence Act, 1872.

Extent.

It extends to all the Provinces of India* and applies to all judicial proceedings¹ in or before any Court,² including Courts-martial, other than Courts-martial convened under the Army Act, the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934, or the Air Force Act but not to affidavits³ presented to any Court or officer, nor to proceedings before an arbitrator;⁴

Commencement of Act.

And it shall come into force on the first day of September, 1872.

COMMENT.—The Indian Evidence Act extends to the whole of British India. 'British India' means, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor General of India or through any Governor or officer subordinate to the Governor General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India

¹ *Rudolf Stallmann*, In re, (1911) 39 Cal. 164; *King-Emperor v. Tun Hlaing*, (1923) 1 Ran. 759, F.B.; *Re Annam Muthirayan*, (1915) 39 Mad. 449.

² *Sris Chandra Nandy v. Rakhala-nanda*, (1940) 43 Bom. L. R. 794, 68 I.

A. 34, [1941] 1 Cal. 468; *Emperor v. Parbhoo*, [1941] All. 843, F.B.

* As amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar.¹

The Indian Evidence Act applies to all judicial proceedings before (a) any Court, or (b) a Court-martial under the Indian Army Act, VIII of 1911 (s. 88). It does not apply to (a) affidavits, and (b) proceedings before arbitrators.

"The law of evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not: whether a certain matter requires to be proved by writing or not: whether certain evidence proves a certain fact or not; that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it."² The law of evidence is a part of the law of procedure.

1. 'Judicial proceedings.'—An inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but, even a Judge, acting without such an object in view, is not acting judicially.³ An inquiry in which evidence is legally taken is included in the term judicial proceeding.⁴ An inquiry about matters of fact, where there is no discretion to be exercised and no judgment to be formed but something is to be done in a certain event as a duty, is not a judicial but an administrative inquiry. Proceedings before a Magistrate under s. 88 of the Criminal Procedure Code are not judicial proceedings under s. 4(d) of the Code.⁵ Similarly, proceedings before a Magistrate not authorised to conduct an inquiry,⁶ or before a Collector under the Land Acquisition Act,⁷ are not judicial proceedings.

2. 'Court.'—This word includes all persons, except arbitrators, legally authorised to take evidence (s. 8).

3. 'Affidavits.'—Affidavits are confined to such facts as the deponent is able of his own knowledge to prove. Matters to which affidavits are confined are regulated by O. XIX, rr. 1, 2 and 3, of the Civil Procedure Code, and by s. 539 of the Criminal Procedure Code.

A declaration in the shape of an affidavit cannot be received as evidence of the facts stated in it.⁸

4. 'Arbitrator.'—The provisions of the Evidence Act do not apply to proceedings before an arbitrator. Arbitrators are bound to conform to the rules of natural justice. They are unfettered by technical rules of evidence.⁹

Repeal of enactments.

2. [Repealed by the Repealing Act, 1938 (I of 1938), s. 2 and Sch.]

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence.

"Court."

¹ General Clauses Act (X of 1897), s. 3 (7).

² *Bain v. Whitehaven and Furness Junction Railway Company*, (1850) 3 H. L. C. 1, 19.

³ *Queen-Empress v. Tulja*, (1887) 12 Bom. 36, 42.

⁴ *Ibid.*

⁵ *The Collector of Benares v. Sheo*

Prasad, (1883) 5 All. 487.

⁶ *Queen-Empress v. Bharna*, (1886)

11 Bom. 702, F.B.

⁷ *Ezra v. The Secretary of State*, (1902) 30 Cal. 36.

⁸ *In re Iswar Chunder Guho*, (1887)

14 Cal. 653.

⁹ *Suppu v. Govindacharyar*, (1887)

11 Mad. 85, 87.

COMMENT.—This definition is not meant to be exhaustive. The word ‘Court’ means not only the Judge in a trial by a Judge with a jury, but includes both Judge and jury.¹ A Magistrate holding a preliminary inquiry under s. 164 of the Code of Criminal Procedure in a police investigation does not exercise the functions of a Court;² but a Magistrate committing a case to the Court of Session is a ‘Court.’³ A commissioner appointed to take evidence under the Civil Procedure Code (O. XXVI, rr. 1-8) or the Criminal Procedure Code (ss. 503-508) must act in conformity with the provisions of this Act, as he is a Court within the meaning of this section.

The Evidence Act applies to proceedings before Indian Marine Courts (Act XIV of 1887, s. 68).

“Fact.”

“Fact” means and includes—

- (1) any thing, state of things, or relation of things capable of being perceived by the senses;
- (2) any mental condition of which any person is conscious.

ILLUSTRATIONS.

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

COMMENT.—Clause (1) refers to external facts which can be perceived by the five senses. Clause (2) refers to internal facts which are the subject of consciousness. Thus, facts are either physical or psychological.

Illustrations (a), (b) and (c) exemplify clause (1), and ill. (d) and (e), clause (2).

A misrepresentation as to the intention of a person is a misrepresentation of a ‘fact.’⁴ See ill. (d). The state of a man’s mind is as much a fact as the state of his digestion.⁵

The popular meaning of the term ‘fact’ does not include any mental condition of which any person is conscious. The legal meaning includes what is tangible or visible or in any way the object of sense.

‘Matter of fact’ is anything which is the subject of testimony. ‘Matter of law’ is the general law of the land, of which the Courts will take judicial cognizance.

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

“Relevant.”

¹ *Empress v. Ashootosh Chuckerbutty*, (1878) 4 Cal. 483, F.B.

² *Queen-Empress v. Bharna*, (1886) 11 Bom. 702, F.B.

³ *Atchayya v. Gangayya*, (1891) 15 Mad. 138, F.B.

⁴ *Re Jaladu*, (1911) 36 Mad. 453;

The Crown v. Mussammat Soma, (1916) P. R. No. 17 of 1916 (Cr.); *Saleh v. Mussammat Bakhtawar*, (1916) P. R. No. 3 of 1917 (Civil).

⁵ Per Bowen, L. J., in *Edington v. Fitzmaurice*, (1885) 29 Ch. D. 459, 483.

COMMENT.—The word ‘relevant’ means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other. ‘Relevant,’ strictly speaking, means admissible in evidence. Erroneous admission of any evidence does not make it relevant.

The word ‘relevant’ is used in the Act with two distinct meanings: (a) as admissible, (b) as connected.¹

Of all rules of evidence, the most universal and the most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule never can be matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties, or otherwise require proof; and anything which is neither directly nor indirectly relevant to those matters ought at once to be put aside as beyond the jurisdiction of the tribunal, and as tending to distract its attention and to waste its time. Evidence may be rejected as irrelevant for one or two reasons: 1st. That the connection between the principal and evidentiary facts is too remote and conjectural. 2nd. That it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered.²

“Facts in issue.” The expression “facts in issue” means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

ILLUSTRATIONS.

A is accused of the murder of B.

At his trial the following facts may be in issue:—

that A caused B’s death;

that A intended to cause B’s death;

that A had received grave and sudden provocation from B;

that A, at the time of doing the act which caused B’s death, was, by reason of unsoundness of mind, incapable of knowing its nature.

COMMENT.—‘Facts in issue’ are facts out of which some legal right, liability, or disability, involved in the inquiry, necessarily arises, and upon which, accordingly, decision must be arrived at. Matters which are affirmed by one party to a suit and denied by the other may be denominated facts in issue; what facts are in issue in particular cases, is a question to be determined by the substantive law or in some cases by that branch of the law of procedure which regulates the law of pleadings, civil or criminal.

¹ *Lala Lakmi Chand v. Sayid Haidar Shah*, (1899) 4 C. W. N. 82, p. c.

² Best, 12th Edn., ss. 251, 252, p. 232.

Criminal cases.—As regards criminal cases, the charge constitutes and includes ‘facts in issue.’ See Chapter XIX of the Criminal Procedure Code.

Civil cases.—As regards civil cases, ‘facts in issue’ are determined by the process of framing issues. See O. XIV, rr. 1-7, Civil Procedure Code.

“Document” means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

ILLUSTRATIONS.

A writing is a document :

Words printed, lithographed or photographed are documents :

A map or plan is a document :

An inscription on a metal plate or stone is a document :

A caricature is a document.

COMMENT.—This definition is similar to the definition in s. 29 of the Indian Penal Code.

Under the term ‘documents’ are properly included all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus the wooden scores on which bakers, milkmen, &c., indicate, by notches, the number of loaves of bread or quarts of milk supplied to their customers; . . . are documents as much as the most elaborate deeds. In some instances, no doubt, the line of demarcation between documentary and real evidence seems faint; as in the case of models or drawings, which clearly belong to the latter head, but differ from that which we are now considering in this, that they are *actual*, not *symbolical* representations. Documents, being inanimate things, necessarily come to the cognisance of tribunals through human testimony; for which reason some old authors have denominated them *dead* proofs (*probatio mortua*), in contradistinction to witnesses, who are said to be *living* proofs (*probatio viva*).¹

“Evidence”.

“Evidence” means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry : such statements are called oral evidence ;

(2) all documents produced for the inspection of the Court ; such documents are called documentary evidence.

COMMENT.—The word ‘evidence,’ considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. This term and the word *proof* are often used as synonyms, but the latter is applied by accurate logicians rather to the effect of evidence than to evidence itself.² ‘Evidence’ has been defined to be any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion affirmative or disaffirmative of the existence of some other matter of fact.

The juristic conception of the term ‘evidence’ in the case of the oral testimony of witnesses is that the party against whom it is used has had the right and oppor-

¹ Best, 12th Edn., ss. 215, 216, pp. 199, 200.

² Taylor, 12th Edn., Vol. I, s. 1, p. 1.

tunity of cross-examining the witnesses. So long as the accused is not allowed the right and opportunity of cross-examining the witnesses, any statements made by them can only be described as statements but cannot be dignified with the name of evidence.¹

A law of evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of enquiring into the truth as to controverted questions of fact.²

The definition of 'evidence' covers (a) the evidence of witnesses, and (b) documentary evidence. It does not cover everything that a Court has before it. There are certain other media of proof; e.g., the statements of the parties, the result of local investigation, facts of which the Court takes judicial notice, and any real or personal property, the inspection of which may be material in determining the questions at issue such as weapons, tools or stolen property.³ The definition of 'evidence' is considered to be incomplete as it does not include the whole material on which the decision of the Judge may rest.

Affidavit.—An affidavit is not evidence within the meaning of this section. It cannot be used as evidence unless the Court has ordered under the Civil Procedure Code any particular facts to be proved by such affidavit.⁴

Confessions of co-accused whether evidence.—The confessions of persons, jointly tried for the same offence with the accused, are not, according to the Bombay High Court, technically evidence.⁵ But the Calcutta High Court has held in a full bench case that, though the evidentiary value of such confessions may be but little, they are 'evidence.'⁶

Written statement of accused.—A statement of an accused in the written statement filed by him is not strictly evidence, even though the Court may consider it.⁷

Evidence taken in another case.—The evidence given in one case upon the issues raised in that case cannot be taken into consideration in another case in which other issues arise, but parties may agree that evidence taken in one suit shall be treated as evidence in another.⁸

Evidence of Judge.—If, in a case, a Judge wishes to give evidence and intends the Court to act on his statement of facts, he should make that statement in the same manner as any other witness, and not merely introduce it in his judgment. A Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts.⁹

Panchnama.—Persons summoned as witnesses during a police investigation are called panchas. A panchnama is merely a record of what a panch sees. The only use to which it can properly be put is that when the panch goes into the witness-

¹ *Sayed Mohammad Husain Afgar Mohani v. Mirza Fakhruddin Beg*, (1932) 8 Luck. 135.

² Speech of Mr. Stephen, Proceedings of the Council of the Governor-General of India, 1871, p. 457.

³ Field, 8th Edn., p. 17.

⁴ *Federal India Assurance Company, Ltd. v. Anand Rao*, [1944] Nag. 436.

⁵ *Queen-Empress v. Khandia bin Pandu*, (1890) 15 Bom. 66; *Nga Tha*

Nyan v. Queen-Empress, (1897) P. J. L. B. 368.

⁶ *Empress v. Ashootosh Chuckerbutty*, (1878) 4 Cal. 483, F.B.

⁷ *Emperor v. Tuti Babu*, (1945) 25 Pat. 33.

⁸ *In re Lubeck*, (1905) 7 Bom. L. R. 894, 32 I. A. 217, 33 Cal. 151.

⁹ *Hurpurshad v. Sheo Dyal*, (1876) 3 I. A. 259.

box and swears to what he saw, the panchnama can be used as a contemporary record to refresh his memory. If the police want to rely on a panchnama they must call a panch to prove it.¹ The panchnama of a search of premises is not evidence of what was found on the search unless the panchas are examined as witnesses.²

A fact is said to be proved when, after considering the matters before it,¹ the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

COMMENT.—The word ‘proof’ seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like. “Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to the conclusion.”³ The degree of certainty which must be arrived at before a fact is said to be proved is that described in this section.⁴ In human affairs everything cannot be proved with mathematical certainty and the law does not require it.⁵ The definition of “proof” centres round probability. The accused in establishing his plea of private defence may discharge his burden by evidence satisfying the jury of the probability of his defence.⁶

The rules of evidence cannot be departed from, because there may be a strong moral conviction of guilt; for a Judge cannot set himself above the law which he has to administer or make it or mould it to suit the exigencies of a particular occasion.⁷ Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.⁸ Suspicion, though a ground for scrutiny, cannot be made the foundation of a decision.⁹ The gravest suspicion against an accused will not suffice to convict him of a crime unless evidence establishes it beyond doubt.¹⁰ “The sea of suspicion has no shore and the Court that embarks upon it, is without rudder and compass.”

I. ‘Matters before it.’—The expression ‘matters before it’ includes matters which do not fall within the definition of ‘evidence’ in s. 3. Therefore, in determining what is evidence other than evidence within the phraseology of the Act, the definition of ‘evidence’ must be read with that of ‘proved.’ It would appear, therefore, that the Legislature intentionally refrained from using the word ‘evidence’ in this definition, but used instead the words, ‘matters before it.’ For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word ‘evidence’ as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration

¹ *Emperor v. Mohanlal Bababhai*, (1940) 48 Bom. L. R. 163.

² *Emperor v. Rustam Lam*, (1931) 34 Bom. L. R. 267.

³ *Hawkins v. Powells Tillery Steam Coal Company, Limited*, [1911] 1 K. B. 988, 995; *Emperor v. Shafi Ahmed*, (1925) 81 Bom. L. R. 515.

⁴ *Abdul Karim v. The Crown*, (1878) P. R. No. 32 of 1878 (Cr.).

⁵ *Emperor v. Shafi Ahmed*, (1925) 31 Bom. L. R. 515, 516.

⁶ *Government of Bombay v. Samuel*, (1946) 48 Bom. L. R. 746, S.B.

⁷ *Barindra Kumar Ghose v. Emperor*, (1909) 37 Cal. 467, 508.

⁸ *Ibid.*

⁹ *Mohammad Mehdi Hasan Khan v. Mandir Das*, (1912) 39 I. A. 184, 190, 34 All. 511, 15 Bom. L. R. 1073, quoted in *Hari Krishna v. King-Emperor*, (1935) 11 Luck. 327, 335.

¹⁰ *Hazaidar Singh v. King-Emperor*, (1932) 7 Luck. 623.

in order to determine whether the particular fact was proved or not.¹ Similarly, the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court though not 'evidence' within the definition given by the Act.

The result of a local enquiry by a presiding judicial officer, although it does not come under cls. (1) and (2) of the definition of the word 'evidence', falls within the meaning of the word 'proved' which comes immediately after.²

Difference between evidence in civil and criminal proceedings.—The rules of evidence are in general the same in civil and criminal proceedings, and bind alike crown and subject, prosecutor and accused, plaintiff and defendant, counsel and client. There are, however, some exceptions, e.g. the doctrine of estoppel applies to civil proceedings only.³ The provisions relating to confessions (ss 24-30), character of persons appearing before Courts (ss. 53-54), and incompetence of parties as witnesses (s. 120), are peculiar to criminal proceedings. "But there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation, both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilised nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty;..... 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.' The expression 'moral certainty' is here used in contradistinction to physical certainty, or certainty properly so called; for the physical possibility of the innocence of any accused person can never be excluded."⁴

Thus, in a civil case, a Judge of fact must find for the party in whose favour there is a preponderance of proof, though the evidence is not entirely free from doubt. In a criminal case no weight of preponderant evidence is sufficient short of that which excludes all reasonable doubt. Unbiased moral conviction is no sufficient foundation for a verdict of guilty unless it is based on substantial facts leading to no other reasonable conclusion than that of guilt. In cases dependent on circumstantial evidence, the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation on any other reasonable hypothesis than that of his guilt. Circumstantial evidence not furnishing conclusive evidence against an accused, though forming a ground for grave suspicion against him, cannot sustain a conviction. To justify the inference of guilt from circumstances, the inculpatory facts must be shown to be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt.⁵ No man can be convicted of an offence where the theory of his guilt is no more likely than the theory of his innocence.⁶

The weakness of the defence and the inability of the accused to prove that innocence are no grounds for convicting them, if the prosecution evidence is not

¹ *Joy Coomar v. Bundhoo Lall*, (1882)
⁹ Cal. 363, 366.

² *Ibid.*

³ Best, 12th Edn., s. 94, p. 81.

⁴ *Ibid.*, s. 95, p. 82.

⁵ *Emperor v. Kangal Mali*, (1905)
41 Cal. 601; *Emperor v. Parbhoo*,
[1941] All. 843, F.B.

⁶ *Emperor v. Shivdas Omkar*, (1912)
15 Bom. L. R. 315.

strong enough and sufficient to justify their conviction.¹ The onus of proof in criminal cases never shifts to the accused, and they are under no obligation to prove their innocence or adduce evidence in their defence or make any statement.²

In cases based on circumstantial evidence that evidence should be so strong as to point unmistakably to the guilt of the accused. The fundamental rule by which the effect of the circumstantial evidence is to be estimated is that in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.³

In a civil case, it is the duty of the parties to place their case before the Court as they think best, whereas in a criminal case it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done.⁴

In a criminal trial, it is for the Court to determine the question of the guilt of the accused and it must do this upon the evidence before it, independently of decisions in a civil litigation between the same parties. A judgment or decree is not admissible in evidence in all cases as a matter of course, and, generally speaking, a judgment is only admissible to show its date and legal consequences.⁵

The rules regulating the admissibility of evidence are, in general, the same in civil as in criminal proceedings. When dealing with the serious question of the guilt or innocence of persons charged with crime, the following general rules have been suggested for the guidance of tribunals :—

1. The onus of proving everything essential to the establishment of the charge against the accused, lies on the prosecutor.

2. The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused.

3. In matters of doubt it is safer to acquit than to condemn, since it is better that several guilty persons should escape than that one innocent person should suffer.

4. There must be clear and unequivocal proof of the *corpus delicti*.

5. The hypothesis of delinquency should be consistent with all the facts proved.⁶

A fact is said to be disproved when, after considering the matters before it,¹ the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

COMMENT.—This is merely the converse of the definition of ‘proved.’²

“Not proved.” A fact is said not to be proved when it is neither proved nor disproved.

COMMENT.—The definition of ‘proved’ is the embodiment of a sound rule of common-sense. It describes what degree of certainty must be arrived at before a fact can be said to be proved. Proof means anything which serves, either imme-

¹ *Har Dayal Singh v. King-Emperor*, 43 All. 283. (1933) 8 Luck. 397.

² *Binayendra Chandra Pande v.* (1931) 59 Cal. 136.

Emperor, (1936) 63 Cal. 929.

³ *Hawaladar Singh v. King-Emperor*, (1932) 7 Luck. 623.

⁴ *Emperor v. Janki Prasad*, (1920)

⁵ *Trailokyanath Das v. Emperor*,

(1931) 59 Cal. 136.

⁶ Best, 12th Edn., ss. 439, 440, 441-451, pp. 372-382.

⁷ *Emperor v. Shafi Ahmed*, (1925) 31 Bom. L. R. 515.

diately or mediately, to convince the mind of the truth or falsehood of a fact or proposition. There is no law in this country, which recognizes different degrees of proof in different cases.¹ The term 'not proved' indicates a state of mind between two states of mind ('proved' and 'disproved') when one is unable to say precisely how the matter stands.²

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it:

"May presume."

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved:

"Shall presume."

When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

"Conclusive proof."

COMMENT.—The term 'presumption,' in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from something proved or taken for granted.³

A presumption means a rule of law that Courts and Judges shall draw a particular inference from a particular fact, or from a particular evidence, unless and until the truth of such inference is disproved.

Under English law presumptions are divided into—

(1) Presumptions of fact. They are akin to "may presume" of this section. See ss. 86-88, 90, 114 and 148(4).

(2) Presumptions of law. These are divided into (a) absolute or irrebuttable presumptions of law, and (b) disputable or rebuttable presumptions of law.

(a) Absolute or irrebuttable presumptions of law are akin to "conclusive proof" of this section. See ss. 41, 112 and 113.

(b) Disputable or rebuttable presumptions are akin to "shall presume" of this section. See ss. 79-85, 89, 105, 107-111.

(3) Mixed presumptions of law and fact. These hold a place midway between presumptions of law and presumptions of fact. These may be regarded also as generally akin to "may presume" of this section.

A Court, where it 'may presume' a fact, has a discretion to presume it as proved, or to call for confirmatory evidence of it, as the circumstances require. In such a case the presumption is not a hard and fast presumption, incapable of rebuttal, a *presumptio juris et de jure*.⁴ In cases in which a Court shall presume a fact, the presumption is not conclusive but rebuttable.

Presumptions of fact or natural presumptions are inferences which are naturally and logically drawn from experience and observation of the course of nature, the constitution of human mind, the springs of human action, the usages and habits

¹ See *Weston v. Peary Mohan Dass*, (1912) 40 Cal. 898.

³ Best, 12th Edn., s. 299, p. 267.

² *Emperor v. Shafi Ahmed*, (1925) 31 Bom. L. R. 515.

⁴ *Emperor v. Shrinivas*, (1905) 7

of society. These presumptions are generally rebuttable. Clause (1) of the section appears to point at presumptions of facts.

Presumptions, or, as they are also called, "intendments" of law, and by the civilians, *presumptiones sen positiones juris*, are inferences or positions established by law, common or statute, and have been shown to be indispensable to every well-regulated system of jurisprudence. They differ from presumptions of fact and mixed presumptions in two most important respects: 1st, that in the latter a discretion, more or less extensive, as to drawing the inference is vested in the tribunal; while in those now under consideration, the law peremptorily requires a certain inference to be made whenever the facts appear which it assumes as the basis of that inference. 2nd, as presumptions of law are, in reality, rules of law, and part of the law itself, the Court may draw the inference whenever the requisite facts are before it.¹ Presumptions of law are based, like presumptions of fact, on the uniformity of deduction which experience proves to be justifiable; they differ in being vested by the law with the quality of a rule, which directs that they *must* be drawn; they are permissive like natural presumptions, which *may* or may not be drawn; and presumptions of law again differ in their force, according as they are rebuttable or irrebuttable. As to the former, the presumption shall stand good only until it is disproved. The latter class, or irrebuttable presumptions, the law holds conclusive.² See ss. 79 to 90 and s. 105, *infra*, as to presumptions of fact and rebuttable presumptions of law.

Clause 3 of the section points at irrebuttable presumptions of law and the number of such presumptions is very few (see ss. 41, 112, 113, *infra*, and s. 82 of the Indian Penal Code).

CHAPTER II.

OF THE RELEVANCY OF FACTS.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant,¹ and of no others.²

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

ILLUSTRATIONS.

- (a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:—

- A's beating B with the club;
- A's causing B's death by such beating;
- A's intention to cause B's death.

- (b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the

¹ Best, 12th Ed., s. 304, pp. 271,

² Norton on Evidence, secs. 97-98.

proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

COMMENT.—Section 3 says that one fact is relevant to another when the one is connected with the other in any of the ways referred to in this chapter. Relevancy is thus fully explained in ss. 6-11. "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely, and in such a way as to overlap each other. Thus a motive for a fact in issue (s. 8) is part of its cause (s. 7); subsequent conduct influenced by it (s. 8) is part of its effect (s. 7). Facts relevant under s. 11 would, in most cases, be relevant under the other sections."¹

The object of this chapter is to point out in what cases collateral facts are relevant.

Object.—The object of this section is to restrict the investigation made by Courts within the bounds prescribed by general convenience.

Principle.—Of no fact can evidence be given unless it be either a fact in issue or one declared relevant under the following sections. Thus evidence of all collateral facts, which are incapable of affording any reasonable presumption as to the principal matters in dispute, are excluded to save public time.

Scope.—This section excludes everything not covered by the purview of some other succeeding section. The last four words of the section 'and of no others' preclude a party from proving any facts not in issue or not declared relevant by any of the remaining sections of this chapter. To establish the relevancy of any fact, it must be shown that it is a fact in issue or fact such as is declared to be relevant. Evidence is to be confined strictly to the issue.

1. 'Facts....declared to be relevant.'—The relevant facts are all those facts which are in the eye of the law so connected with or related to the facts in issue that they render the latter probable or improbable.

2. 'And of no others.'—The section excludes everything which is not covered by the purview of some other section which follows in the Statute.² Any one who wants to give evidence on a particular fact must show that it is admissible under some one or other of the following sections. The words "and of no others" impose a duty on the Court to exclude evidence of irrelevant facts, irrespective of objections by the parties. In criminal proceedings this duty is expressly imposed by the Criminal Procedure Code, s. 298. In civil proceedings see the Code of Civil Procedure, 1908, O. XIII, r. 3.³

Admissibility of evidence.—The Court is to decide the question of admissibility of evidence (s. 136, *infra*). It should be decided as it arises and should not be reserved until judgment in the case is given. The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. A party objecting to a question must do so as soon as it is stated and before the answer is given. When an irrelevant document is tendered an objection should be made at that time. If it is not taken in time, it is considered to be waived.

A party filing a document cannot urge its inadmissibility when the opposite party seeks to use it against him.⁴

Where no objection is taken in the Court of first instance to the reception

¹ Stephen's Introduction, p. 72.

² *The Collector of Gorakhpur v. Palakdhari Singh*, (1889) 12 All. 1, 43, F.B.

³ Stokes' Anglo Indian Codes, Vol. II, p. 854.

⁴ *Raman v. Secretary of State for India in Council*, (1901) 24 Mad. 427.

of a document in evidence, it is not within the province of the appellate Court to raise or recognise it in appeal.¹ The appellate Court, however, has a perfect right to attach such weight to the document as it thinks proper, or to say whether it ought to be treated as evidence as against particular parties to the suit.²

Explanation.—This Explanation prohibits a party from claiming any relief upon facts or documents not stated or referred to by him in his pleadings. Illustration (b) elucidates the meaning of the Explanation.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

¹ Relevancy of facts forming part of same transaction.

ILLUSTRATIONS.

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

COMMENT.—Principle.—This section admits those facts the admissibility of which comes under the technical expression *res gestae* [i.e. the things done (including words spoken) in the course of a transaction], but such facts must 'form part of the same transaction.' If facts form part of the transaction which is the subject of enquiry, manifestly evidence of them ought not to be excluded. The question is whether they do form part or are too remote to be considered really part of the transaction before the Court. A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of inquiry which may be in issue. Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue although it may not be actually in issue, and although if it were not part of the same transaction it might be excluded as hearsay.³ Illustration (b) indicates that acts done at different places and times may form part of the same transaction. Thus, a transaction consists both of the physical acts and the words accompanying such physical acts, whether spoken by the person doing such acts, the person to whom they were done or any other person or persons. Such words are admissible in evidence as parts of a transaction [*vide* ill. (a)]. The expression 'by-standers' used in ill. (a) means the persons who are present at the time of the occurrence and not those who gather on the spot after the occurrence. The remarks made by persons

¹ *Chimnaji Govind Godbole v. Dinkar* 6 Cal. 666, 670.

Dhondav Godbole, (1886) 11 Bom. 320.

³ *Chain Mahto v. The Emperor*,
² *Akbur Ali v. Bhyea Lal Jha*, (1880) (1906) 11 C. W. N. 266, 270.

other than the eye-witnesses could only be hearsay because they must have picked up the news from others.¹

A transaction in its ordinary sense is some business or dealing which is carried on or transacted between two or more persons.²

This and the following sections deal with circumstantial evidence. Sections 7, 8 and 9 explain and illustrate this section.

CASES.—Facts forming part of same transaction.—Statements of bystanders witnessing a transaction are relevant if they are made while the transaction is in progress or so shortly before or after it as to form part of the same transaction.³ Where A was tried for the murder of B by shooting him, the facts that the person, then in the room, with B, saw a man with a gun in his hand pass a window opening into the room where B was shot, and thereupon exclaimed “there’s butcher” (a name by which A was known), were held to be relevant.⁴ The only evidence against an accused charged with having voluntarily caused grievous hurt was a statement made in the presence of the accused by the person injured to a third person, immediately after the commission of the offence. The accused did not, when the statement was made, deny that she had done the act complained of. It was held that the evidence was admissible under this section and s. 8, ill. (g).⁵

Facts not so connected as to form part of same transaction.—Where a person was charged with forging a particular document, evidence that a number of documents apparently forged, or held in readiness for the purpose of forgery, were found in the accused’s possession, was held inadmissible.⁶ The accused was charged with having received illegal gratifications from C. & Co. on three occasions in 1876. In 1876, 1877, and 1878, C. & Co. were doing business as commissariat contractors and the accused was the manager of the commissariat office. It was held that the evidence of similar but unconnected instances of receiving illegal gratifications from C. & Co. in 1877 and 1878 was not admissible against him under ss. 5 to 13.⁷ Evidence of witnesses who deposed that the deceased had made certain statements to them either nine months or even ten days prior to his murder were held inadmissible under this section or s. 8.⁸

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Facts which are the occasion, cause or effect of facts in issue.

ILLUSTRATIONS.

(a) The question is, whether A robbed B.

¹ *Nasir Din v. The Crown*, [1944] Lah. 461.

² *Gujju Lall v. Fatteh Lall*, (1880) 6 Cal. 171, F.B.

³ *Chain Mahto v. The Emperor*, (1906) 11 C. W. N. 266.

⁴ *Fowkes*, (1856) *Stephen’s Digest*, 12th edn. (1946).

⁵ *In re Surat Dhobni*, (1884) 10 Cal. 302.

⁶ *Hari Chintaman Dikshit v. Moro Lakshman*, (1886) 11 Bom. 89.

⁷ *Empress v. M. J. Vyapoory Moode-liar*, (1881) 6 Cal. 655.

⁸ *Autar Singh v. The Crown*, (1923) 4 Lah. 451; *Jowala Sahai v. Crown*, (1914) P. R. No. 34 of 1914 (Cr.). The statement of a person, not examined as a witness, alleging abduction by the accused, a year before, is not part of the *res gestae* of the subsequent abduction for which they were on trial: *Khajiruddin Sonar v. Emperor*, (1925) 53 Cal. 372.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

COMMENT.—This section admits a very large class of facts connected with facts in issue or relevant facts, though not forming part of the transaction. Facts forming part of the same transaction are admissible under the preceding section. Evidence relating to collateral facts is admissible when such facts will, if established, establish reasonable presumption as to the matter in dispute and when such evidence is reasonably conclusive. The section provides for the admission of several classes of facts which are connected with the transaction under inquiry in particular modes viz., (1) as being the occasion or cause of a fact; (2) as being its effect; (3) as giving opportunity for its occurrence; and (4) as constituting the state of things under which it happened. When an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof.¹

A fact in issue cannot be proved by showing that facts similar to it, but not part of the same transaction, have occurred at other times. Thus, when the question is, whether a person has committed a crime, the fact that he had committed a similar crime before is irrelevant.

Illustration (a) is an instance of facts relevant as giving occasion or opportunity, (b), of facts constituting an effect, (c), of facts constituting the state of things under which an alleged fact happened.

Evidence of footprints is admissible under this section.²

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party,¹ or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1².—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2³.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

¹ Stephen's Introduction.

² *Sidik v. Crown*, [1941] Kar. 525.

ILLUSTRATIONS.

(a) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is whether a certain document is the will of A.

The facts, that not long before the date of the alleged will A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is whether A robbed B.

The facts that, after B was robbed, C said in A's presence—"the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant.

(g) The question is whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157.

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating

to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under section 32, clause (1), or as corroborative evidence under section 157.

COMMENT.—Principle.—Under this section the motive which induces a party to do an act, or the preparation which he makes in its commission, will be taken into account. Evidence of motive or preparation becomes important when a case depends upon circumstantial evidence only.

The Evidence Act intends to make only those statements admissible which are the essential complement of acts done or refused to be done, so that the act itself, or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial.¹ The statements and the acts must be so blended as to form part of a thing observed by the witnesses and sought to be proved. The existence of the fact which these statements accompany must be established independently.²

This section embodies the rule that the testimony of *res gestæ* is allowable when it goes to the root of the matter concerning the commission of a crime. Consequently, a verbal statement to a police-officer during the time of recovery of articles upon the information of an accused in custody, is admissible in evidence.³

Motive.—Motive is that which moves a man to do a particular act. There can be no action without a motive, which must exist for every voluntary act. Generally speaking the voluntary acts of sane persons have an impelling emotion or motive. Motive in the correct sense is the emotion supposed to have led to the act. It is often proved by the conduct of a person. "The ordinary feelings, passions and propensities under which parties act, are facts known by observation and experience; and they are so uniform in their operation that a conclusion may be safely drawn that, if a party acts in a particular manner, he does so under the influence of a particular motive".⁴ Previous threats, previous altercations, or previous litigations between parties are admitted to show motive.

If there is motive in doing an act, then the adequacy of that motive is not in all cases necessary. Heinous offences have been committed from very slight motive. Evidence of motive is material in criminal cases. Illustrations (a) and (b) refer to motive. The motives of parties can only be ascertained by inference drawn from facts. Where A was tried for the murder of B, the fact that, at the instigation of A, B murdered C long before B's murder, and that A, at about that time, used expressions of malice against C, were held to be relevant as furnishing motive on the part of A who murdered B.⁵

Existence of previous and subsequent similar conduct is relevant to an issue of intention or other state of mind although it cannot be used to prove the commission of the crime.⁶

Preparation.—Preparation consists in devising or arranging the means or measures necessary for the commission of a crime. Preparations on the part of

¹ *Empress v. Rama Birapa*, (1878) 3 Bom. 12, 17.

² *Mrs. M. F. Rego v. Emperor*, (1933) 29 N. L. B. 251.

³ *Kali Jeeban Bhattacharjya v. Em-*

peror, (1936) 63 Cal. 1053.

⁴ *Com. v. Webster*, 5 Cuch. 295, 316.

⁵ *Rea v. Clewes*, (1830) 4 C. & P. 221.

⁶ *Emperor v. Shiv Kali Goswami*, [1944] All. 758, F.B.

the accused to accomplish the crime charged, or to prevent its discovery, or to aid his escape, or to avert suspicion from himself are relevant on the question of his guilt. Where the question is whether A has committed an offence, the fact of his having procured the instruments, which are used in its commission, is relevant. Illustrations (c) and (d) refer to preparation.

But no inference of guilt will arise where the preparations may have been innocent, or for the execution of something different, though illegal; or where the crime for the execution of which the preparations were made may have been subsequently frustrated or voluntarily abandoned. A is indicted for murdering B by poisoning him. It appears that shortly before A purchased a quantity of poison. This raises an inference of guilt. But it appears that A had purchased the poison to kill vermin. This overthrows the inference of guilt. A prepares poison with which he intends to kill B. Before he uses it he repents of his crime and abandons the idea of killing B. This overthrows the inference arising from the purchase of poison.

1. 'Conduct of any party.'—The conduct of any party or his agent in reference to a suit or proceeding will be scanned under this section. A fact can be proved by conduct of a party and by surrounding circumstances. The production of articles by an accused person is relevant as evidence of conduct. Statements accompanying or explaining conduct are also relevant as part of the conduct itself. If such statements do not appear on record, the evidence remains incomplete or imperfect.¹

In the case of documents the Courts very often interpret them by evidence of the mode in which property dealt with by them has been held and enjoyed. Sugden, L. C., in a case said: "Tell me what you have done under such a deed, and I will tell you what that deed means".²

The word 'party' includes the plaintiff and defendant in a civil suit as well as the accused in a criminal prosecution.

The 'first information report', that is, information recorded under s. 154, Criminal Procedure Code, may become admissible under this section. The importance of first information lies in the fact that it shows on what materials the investigation commenced and what was the story then told.³

2. Explanation 1.—The conduct of a party interested in any proceeding at the time when the facts occurred out of which the proceeding arises is extremely relevant. According to this Explanation the word 'conduct' does not include statements, unless those statements accompany and explain acts other than statements; and it is on such a statement that the significance of the act, which it accompanies, in many cases, wholly depends. Mere statements, as distinguished from acts, do not constitute conduct. A statement by a retiring partner, made immediately after his retirement, as the reason for his refusing to continue to guarantee the firm's account with a bank, may be admissible to explain his conduct.⁴

'Conduct' may in certain circumstances include statements as well as acts, but in doing so it still retains the difference between an act and a statement. There is a clear difference between a statement and an act. A statement must consist of words, whether spoken or written, or spelled out as would be done by a mute

¹ *Emperor v. Rafique-ud-din Ahmad*, (1934) 62 Cal. 572; *Neharu v. Emperor*, [1937] Nag. 268.

² *The Attorney-General v. Drummond*, (1842) 1 Dru. & War. 353, 368, on appeal,

(1849) 2 H. L. C. 837.

³ *Manimohan Ghosh v. Emperor*, (1931) 58 Cal. 1312.

⁴ *Pramatachandra Kar v. Bhagwandas Madanlal*, (1931) 59 Cal. 40.

person on his fingers or otherwise. Acts, however, exclude words and cannot be translated into words.¹

This Explanation points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such a case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here what the injured person says and what he does may be taken together and proved as a whole.²

The conduct made relevant under this section is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and it does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons. Thus, signs made by the deceased, shortly before his death, when questioned as to the circumstances under which injuries had been inflicted on her, could not be proved as conduct, inasmuch as taken alone, and without referring to questions leading to them, there was nothing to connect them with the cause of death and so to make them relevant.³ Such questions and signs taken together are admissible in evidence under s. 32(1) as 'verbal statements' as to the cause of the death of the deceased.⁴

Statements made by an accused while in the custody of the police are not admissible in evidence as conduct or otherwise.⁵ This section, so far as it admits a statement as included in the word 'conduct', must be read in connection with ss. 25 and 26, and cannot admit a statement as evidence which would be shut out by those sections.⁶ The evidence of police officers as to the pointing out of the various places by the accused cannot be treated as evidence of conduct because such evidence really amounts to confession of his guilt by the accused while he is in the custody of the police.⁷ The Allahabad High Court has dissented from this view and held that the pointing out of property does not amount to a confession. The digging out and handing over to the police by the accused person, without saying anything, of certain articles from particular spots to which he took the police and witnesses does not amount to a "statement",⁸ but is an "act" or "conduct".

Acts of parties cannot be allowed to affect the construction of written instruments if that construction be in itself ambiguous;⁹ otherwise, the conduct of the party is very important in the construction of documents. In criminal cases all the circumstances of the case in every part of the conduct of the accused may be taken into consideration for the purpose of showing the presence of crime by negating the operation of every natural agency.

¹ *Emperor v. Nanua*, [1941] All. 280.

² *Queen-Empress v. Abdullah*, (1885) 7 All. 385, 395, F.B.; *Emperor v. Sadhu Charan Das*, (1921) 49 Cal. 600; *Chandrika Ram Kahar v. King-Emperor*, (1922) 1 Pat. 401; *Ranga v. The Crown*, (1924) 5 Lah. 805. All these are approved of in *Chandrasekhara alias Alisandiri v. The King*, [1937] A. C. 220, 39 Bom. L. R. 359, P.C.

³ *Queen-Empress v. Abdullah*, (1885) 7 All. 385, F.B.

⁴ *Ibid.*

⁵ *Queen-Empress v. Nana*, (1889) 14 Bom. 260, F. B.

⁶ *Queen Empress v. Nana*, (1889) 14 Bom. 260, F.B. See the observations of Broomfield, J., in *Emperor v. Ganu Chandra*, (1931) 34 Bom. L. R. 303, 311, 56 Bom. 172. See the opinion of the division bench in the full bench case of *Syamo Maha Patro*, In re, (1932) 55 Mad. 903, F.B.

⁷ *Turab v. King-Emperor*, (1934) 10 Luck. 281; *Emperor v. Hira Gotar*, (1919) 21 Bom. L. R. 724.

⁸ *Emperor v. Nanua*, [1941] All. 280.

⁹ In re *Purmanandas Jeewandas*, (1882) 7 Bom. 109.

Illustration (d) refers to previous conduct; illustration (e), to previous and subsequent conduct of the accused. Illustrations (j) and (k) make statements of a person against whom an offence has been committed, relevant. Illustration (j) is an example of the admissibility of a complaint in a case of rape as evidence of conduct.

3. **Explanation 2.**—Statements made in the presence of a party are admissible as the groundwork of his conduct. Thus, if a man accused of a crime is silent, or flies, or is guilty of false or evasive answers, his conduct, coupled with the statements, is in the nature of an admission, and therefore evidence against himself. It is a general rule that statements made in the presence of the accused, and which he might have contradicted, if untrue, are evidence against him.¹ See illustrations (f) and (g). The maxim *qui taci consentire videtur* (silence gives consent) must be taken with considerable qualification. For silence to carry incriminating force there must be circumstances which afford an opportunity to speak. Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not.² Before the words of a third person are let in, it must be shown that the conduct which they allege to affect is relevant.³

CASES.—In a trial for kidnapping, robbery and murder, the subsequent conduct of the accused, in making evidence for himself to prove *alibi*, his projected flight by sea, and his endeavour to conceal his identity, were admitted in evidence as conduct indicating a consciousness of impending danger and guilt.⁴ Evidence of possession by the accused of a large number of coins not in common circulation and his attempt to dispose of them were held to be admissible, on his trial for having fraudulently delivered to another counterfeit coins knowing them to be counterfeit.⁵ In a trial for the offence of cheating, the facts that the accused was financially embarrassed and had attempted to cheat on other occasions were held to be relevant to prove motive under this section.⁶ Some months before he was murdered, the deceased wrote a letter to the Commissioner of Police, Bombay, asking for protection and stating that he apprehended injury from accused No. 2 and was in fear of his life. At the trial of accused No. 2 for abetting the murder of the deceased by accused No. 1 the letter was offered in evidence for the prosecution. It was held that the letter was admissible in evidence as containing statements which accompanied and explained the conduct of the deceased, such conduct having been influenced by a fact in issue [viz., accused No. 2's alleged intention to cause deceased's death, s. 5, ill. (a)] and a relevant fact (viz., accused No. 2's alleged ill-will towards deceased constituting a motive for accused No. 2's alleged complicity in the stabbing of deceased.)⁷ At the trial of the accused for the murder of K the approver gave evidence that he and the accused had murdered one B a few days before the murder of K, and that they proposed to conceal the murder of B by causing injuries to K and getting themselves arrested for so doing. It was held that the evidence was admissible to establish motive for the murder of K with which the accused were charged.⁸

¹ *Reg. v. Mallory*, (1884) 15 Cox 456.

² Per Bowen, L.J. in *Wiedemann v. Walpole*, [1891] 2 Q. B. 534, 539.

³ *Queen-Empress v. Abdullah*, (1885) 7 All. 385, F.B.; *Emperor v. Hira Gobar*, (1919) 21 Bom. L. R. 724.

⁴ *Queen-Empress v. Sami*, (1890) 13 Mad. 426.

⁵ *Queen-Empress v. Nur Mahomed*, (1888) 8 Bom. 223.

⁶ *A. V. Joseph v. King-Emperor*, (1924) 3 Kan. 11.

⁷ *Emperor v. Manchankhan*, (1923) 34 Bom. L. R. 1087.

⁸ *Natha Singh v. Emperor*, (1946) 49 Bom. L. R. 225, P.C.

Illustrations (j) and (k).—Under these illustrations the terms of the immediate complaint (not the formal complaint to a Magistrate or Police officer) are admissible as original evidence.¹

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Facts necessary to explain or introduce relevant facts.

ILLUSTRATIONS.

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—"I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it—"A says you are to hide this." B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

COMMENT.—Section 7 deals with the admissibility of facts which are the occasion, cause, or effect of facts in issue. Section 8 similarly makes admissible facts showing motive or preparation for any fact in issue or relevant fact. This section makes admissible facts which are necessary to explain or introduce relevant facts, such as place, name, date, identity of parties, circumstances and relations of the parties. Thus, evidence of other offences committed by the accused is admitted in order to establish his identity or to corroborate the testimony of a witness in a material particular. Section 11 is like the present section.

¹ *The Queen v. J. Macdonald*, (1872) 10 Beng. L. R. (Appx.) 2.

Illustrations (a) and (b) are examples of introductory fact.

Illustrations (d) and (e) indicate that explanatory statements are admitted under this section irrespective of the fact whether the person against whom it is made heard it or was present when it was made. Under this section it is not necessary that the person against whom the statement is made should be present when it is made. The English law requires the presence of the person against whom the statement is made. Such statement is inadmissible under English law as hearsay evidence unless it is made in the presence of the person whose conduct it affects. This section has introduced a dangerous innovation.

CASES.—Facts supporting or rebutting an inference.—Where the question was whether A wrote an anonymous letter to B, threatening him and requiring him to meet A at a particular place at an appointed time, the fact that A went to the place at the time appointed would be conduct relevant under this section and the fact that A had some other business to transact at that place and time would be relevant as tending to rebut the inference raised by his going to the place that he was the author of the letter.¹

Relevant fact.—The Chief Commissioner of Police, Nysaland, cabled to the Commissioner of Police in Bombay, informing him that four blank drafts bearing certain numbers had been stolen from a bank and it was apprehended that signatures would be forged and negotiation attempted in Bombay. It was held that the cablegrams were admissible in evidence under this section to explain the conduct of the officials of the bank in which negotiation was attempted and of the Bombay police.² In a case of conspiracy to commit dacoity facts showing close and intimate association of the accused with the approver were held admissible under this section.³

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention,¹ after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Things said or done by conspirator in reference to common design.

ILLUSTRATIONS.

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

¹ *William Barnard*, (1758) 19 How. 27 Bom. L. R. 1373, 49 Bom. 878.
St. Trials 815.

² *Emperor v. Abdul Gani*, (1925) (1929) 32 Bom. L. R. 324, 54 Bom. 524.

³ *Emperor v. Wahiduddin* (No. 1),

COMMENT.—This section refers to things said or done by conspirators in reference to the common design.

Principle.—The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted, is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attitude of individuality, so far as regards the prosecution of the common design; thus rendering whatever is done or said by any one in furtherance of that design, a part of the *res gestæ* and therefore the act of all.

Scope.—The operation of this section is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence.¹ There must be reason to believe that there was a conspiracy and that the accused persons were members of that conspiracy.² The section refers to things said or done by a conspirator in reference to the common intention. Anything said, done or written "in reference to the common intention" is admissible, and therefore the contents of letters written by one in reference to the conspiracy is relevant against the others even though not written in support of it or in furtherance of it.³

English law.—This section is wider than the English law which requires the acts or declarations to have been done or made in the execution or furtherance of the common purpose. Under the English law, therefore, if the acts and declarations of other conspirators were not in furtherance of the common purpose or were done or made after the person against whom the evidence is to be given had severed his connection with the conspiracy, they will not be relevant against him. Under this section acts done after the termination of the conspiracy are also relevant.

Conspiracy.—Conspiracy consists in a combination or agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means.

The evidence of a conspirator is admissible against his co-conspirator on the principle that the thing done, written or spoken was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy: or the words written or spoken may in themselves be acts done in the course of the conspiracy. The words of this section must be construed in accordance with the above principle, and are not capable of being widely construed so as to include a statement made by one conspirator in the absence of the other with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past.⁴

If two or more persons conspire together to commit an offence, each is regarded as being the agent of another, and just as the principal is liable for the acts of the agent, so each conspirator is liable for what is done by his fellow-conspirator, in furtherance of the common intention entertained by both of them.⁵

1. 'Common intention.'—These words signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of

¹ *Barindra Kumar Ghose v. Emperor*, All. 736. (1909) 37 Cal. 487, 504.

² *Chandratat v. Crown*, [1945] Kar. 43 Bom. L. R. 20, P.C.

³ *Emperor v. Bhola Nath*, [1939] 31 Bom. L. R. 515.

⁴ *Mirza Akbar v. Emperor*, (1940)

43 Bom. L. R. 20, P.C.

⁵ *Emperor v. Shafi Ahmed*, (1925)

the common intention, once reasonable ground has been shown to believe in its existence. Hence, any narrative or statement or confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist is not admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference.¹

The section applies to acts and declarations of one of a body of conspirators in respect of the common design of all. Everything said or done by any of the conspirators in furtherance of the common object is evidence against each and all of the parties concerned, whether they were present or absent. Thus, the cries of the mob, with whose proceedings Lord Gordon was connected, though made in his absence, were held to be admissible against him, as explanatory of the objects which he in common with the multitude had in view.² The section is intended to make evidence communications between different conspirators, while the conspiracy is going on, with reference to the carrying out of the conspiracy.³

In order to decide whether any act done or statement made or thing written by an alleged conspirator is admissible in evidence against any person, the test is to see, first, whether there is reasonable ground to believe that a conspiracy existed between him and such person; and, secondly, whether such act, statement or writing had reference to their common intention.⁴ The agreement to conspire may be inferred from circumstances which raise a presumption of a concerted plan to carry out an unlawful design.⁵ A conspiracy need not be established by proof which actually brings the parties together; but may be shown, like any other fact, by circumstantial evidence.

Under s. 34 of the Indian Penal Code, when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. This section makes admissible in evidence things said or done by a conspirator in reference to the common design. It applies to crimes as well as torts, i.e., to joint offenders as well as joint tort-feasors. It has no bearing on the question as to how far a conspiracy to commit an offence or actionable wrong is an offence under the Indian Penal Code. It is based upon the principle that, when several persons conspire to commit a crime or a tort, each makes the rest his agent to carry the plan into execution.

Confession.—A confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its objects and the names of its members, is not admissible under this section against the co-conspirators jointly tried with him, but only under s. 30.⁶

Agreement but not direct meeting necessary.—"Though to establish the charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. So again it is not necessary that all should have joined in the scheme from the first; those who come

¹ *Mirza Akbar v. Emperor*, (1940) 43 Bom. L. R. 20, P.C.

² *Lord George Gordon*, (1781) 21 St. Tr. 486, 535; *Saya Kye v. Queen-Empress*, (1892-96) 1 U. B. R. 148.

³ *Emperor v. Abani Bhushan Chucker-butty*, (1910) 38 Cal. 169, 178, S.B.

⁴ *Balmokand v. Crown*, (1915) P. R. No. 17 of 1915 (Cr.).

⁵ *Barindra Kumar Ghose v. Emperor*, (1909) 37 Cal. 467.

⁶ *Emperor v. Abani Bhushan Chucker-butty*, (1910) 38 Cal. 169, S.B.

in at a later stage are equally guilty, provided the agreement be proved".¹

CASE.—On a trial for forgery, a letter written by a person, who had no hand in the forgery, to his brother, a stranger to the transaction, was produced. The writer of the letter was not examined; but the letter was allowed to go in under this section. It was held that the letter was not admissible in the absence of evidence that its writer was a conspirator in the fabrication of the will.²

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

- (1) if they are inconsistent with any fact in issue¹ or relevant fact;
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.²

ILLUSTRATIONS.

(a) The question is whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant.

Comment.—Principle.—Under this section, any fact which either disproves or tends to prove or disprove any claim or charge in a case is made relevant. The effect of this and the previous section is to make every relevant fact admissible as evidence. Thus, where the question is whether X lent money to Y, evidence of the property of X about the time of the alleged loan is admissible as tending to disprove it. Similarly, where the question is, whether X is the child of Y, evidence of the resemblance, or want of resemblance, of X to Y is admissible. In *Reg. v. Parbhudas*³ West, J. said :—"Section 11 of the Evidence Act is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connexions of human affairs are so infinitely various and so far-reaching, that thus to take the section in its widest admissible sense, would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. One of the objects of a law of evidence is to restrict the investigations made by Courts within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission, on all occasions, of every circumstance on either side having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession, as the inquiry proceeded. That such an extensive meaning was not in the mind of the Legislature, seems to be shown by

¹ Per Jenkins, C. J. in *Barindra Kumar Ghose v. Emperor*, (1909) 37 Cal. 467, 507.

² *Emperor v. Keshav Narayan*, (1913)

25 Bom. L. R. 248.

³ (1874) 11 B. H. C. 90, 91; *Emperor v. Panchu Das*, (1920) 47 Cal. 671, F.B.

several indications in the Act itself. The illustrations to Section 11 do not go beyond familiar cases in the English Law of Evidence." This section renders inadmissible the evidence of one crime (not reduced to legal certainty by a conviction) to prove the existence of another unconnected crime, even though it be cognate.¹

The admissibility under this section in each case must depend on how near is the connection of the facts sought to be proved with facts in issue, to what degree do they render facts in issue probable or improbable when taken with other facts in the case and to what extent would the admission of the evidence be inconsistent with principles enunciated elsewhere in the Act.² Where the accused was charged with having entered into a conspiracy to bring false evidence against a certain person, his previous acts of having instituted unfounded prosecutions against that person are admissible in evidence.³

In order that a collateral fact may be admissible as relevant under this section there are two requirements :

(1) that the collateral fact must itself be established by reasonably conclusive evidence ; and

(2) that it must, when established, afford a reasonable presumption or inference as to the matter in dispute.⁴

Thus, where the question in issue was whether possession was duly given of certain immovable properties under a deed of gift, so as to make it complete and valid under the Muhammadan law, it was held that, if the deed of gift must be held to have operated effectually as to moveable property, the fact of this partial delivery, being a collateral fact fulfilling all the requirements of the law, was relevant under this section as making the existence of the facts in issue highly probable.⁵

Under certain circumstances, in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.⁶ Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property.⁷

As a general rule, this section is controlled by s. 32 where the evidence consists of statements of persons who are dead or who cannot be found ; but this rule is subject to certain exceptions. The test, whether the statement of a person who is dead or who cannot be found is relevant and admissible under this section (presuming that it is in other respects within the intention of the section) although it would not be admissible under s. 32, is this. It is admissible under s. 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material that he did say it. In these circumstances, no amount of cross-examination

¹ *Reg. v. Parbhudas*, (1874) 11 B. H. C. 90 ; *Emperor v. Goma Rama*, (1944) 46 Bom. L. R. 811, 815.

² *Htin Gyaw v. King-Emperor*, (1927) 6 Ran. 6, 14.

³ *Ibid.*

⁴ *Khazer Sultan v. Rukha Sultan*, (1904) 6 Bom. L. R. 983.

⁵ *Ibid.*, p. 985.

⁶ *Tepu Khan v. Rajani Mohun Das*, (1898) 25 Cal. 522, F.B., holding that

Gujju Lall v. Fattah Lall, (1880) 6 Cal. 171, F.B., is materially qualified by the decisions of the Privy Council in *Ram Ranjan Chuckerbutty v. Ram Narain Singh*, (1894) 22 I. A. 60, 22 Cal. 533, and *Bitto Kunwar v. Kesho Pershad*, (1897) 24 I. A. 10, 19 All. 277.

⁷ Per Ranade, J., in *Lakshman v. Amrit*, (1900) 24 Bom. 591, 599, 2 Bom. L. R. 386, 393.

could alter the fact, if it be a fact, that he did say the thing, and if nothing more is needed to bring the thing said in under s. 11, then the case is outside s. 32.¹

1. 'Inconsistent with any fact in issue.'—The usual theory of essential inconsistency is that a certain fact cannot co-exist with the doing of the act in question, and, therefore, that if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. Thus the fact of presence elsewhere is essentially inconsistent with the presence at the place and time alleged, and therefore with personal participation in the act (theory of *alibi*).

2. 'Highly probable or improbable.'—These words point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the co-existence of the two *highly* probable.² Where one of the facts in issue was possession of a revolver, the fact that, three weeks previously, the accused displayed a revolver similar in size and appearance to that with the possession of which he was charged, was held relevant under this section.³

CASES.—Highly probable.—On the question whether certain leases were perpetual, it was held that the fact that the intention indicated by the acts and conduct of the parties was to make certain other leases, granted at about the same time, under similar circumstances, perpetual would make it highly probable that the same was the intention with regard to the leases in dispute, and that the facts relating to these leases would be relevant facts.⁴ Where the plaintiffs and some of the defendants were co-owners of certain properties, the question at issue being whether there was a partition between them, and whether under that partition the defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and a written statement filed by the defendants in certain previous suits admitting the partition and the exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence, it was held that the documents were admissible against those defendants as they made the existence of the partition, which was the fact in issue, highly probable. They were also admissible under s. 21, cl. (3).⁵

In a case where the previous suit was to recover a two-thirds share of the property in question, and the subsequent suit was by a different plaintiff to recover the remaining one-third share of the same property, it was held in the subsequent suit that the judgment in the previous suit was not admissible in evidence, the subject-matter in the two suits not being identical.⁶

In a charge of forgery, evidence of possession by the accused of other documents suspected to be forged was held to be inadmissible.⁷ Where the question was whether a person was a habitual cheat, the fact that he belonged to an organization formed for the purpose of habitually cheating in concert was held to be relevant, and it was open to the prosecution to prove against each person that the members of the gang did cheat.⁸ But in a case of conspiracy to commit dacoity, facts showing that the object of the illegal association during a period of several months prior to the

¹ *R. D. Sethna v. Mirza Mahomed Shirazi*, (1907) 9 Bom. L. R. 1047.

² *Empress v. M. J. Vyapoory Moodeliar*, (1881) 6 Cal. 655, 662.

³ *Sarojekumar Chakrabarti v. Emperor*, (1932) 59 Cal. 1361.

⁴ *Narsingh Dyal Sahu v. Ram Narain Singh*, (1903) 30 Cal. 883, 896.

⁵ *Gyannessa v. Mobarakannessa*, (1897) 25 Cal. 210; *Nana v. Shankar*,

(1901) 3 Bom. L. R. 465; *Naro Vinayak Patwardhan v. Narhari bin Raghnath*, (1891) 16 Bom. 125.

⁶ *Tepu Khan v. Rajani Mohun Das*, (1898) 25 Cal. 522, F.B.

⁷ *Reg. v. Parbhudas*, (1874) 11 B. H. C. 90.

⁸ *Kalu Mirza v. Emperor*, (1909) 37 Cal. 91.

dacoity in question had been the commission of thefts and other discreditable acts were held inadmissible to prove the nature and character of the association.¹

Facts inconsistent with fact in issue.—The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, where the latter stated he was and saw the accused person, was admissible in evidence, even though the witness for the prosecution might not himself have been cross-examined on the point.²

A letter written by an accused, when self-disserving, was *prima facie* evidence against him if it related distinctly to a relevant point.³

Recitals in sale deed.—Recitals in a sale deed by a vendor in favour of his vendee are not admissible in evidence in a suit to which neither of them is a party.⁴

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

In suits for damages, facts tending to enable Court to determine amount are relevant.

COMMENT.—Principle.—This section enables the Court to admit any facts which will help it to determine the amount of damages which ought to be awarded to a party. When damages are claimed in a suit, the amount of damages is a fact in issue. 'Damages' are the pecuniary satisfaction which the plaintiff may obtain by success in an action. They are limited to the loss which the plaintiff has actually sustained.

Under this section it may be laid down generally that evidence tending to determine, i.e., to increase or diminish the damages, is admissible though not expressly involved in issue. Thus, in an action for breach of promise of marriage, the plaintiff may give evidence of the defendant's fortune; for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery; nor for malicious prosecution. But the evidence of the amount of damages, which is the necessary and obvious result of the defendant's breach of contract, or of his tort, may be proved, though only alleged generally in the plaint.⁵

Section 73 of the Indian Contract Act lays down the rule governing damages in actions on contract.

Section 55 of the Evidence Act lays down the conditions under which evidence of character may be given in civil cases with a view to damages.

13. Where the question is as to the existence of any right¹ or custom,² the following facts are relevant:—

Facts relevant when right or custom is in question.

(a) any transaction³ by which the right or custom in question was created, claimed,⁴ modified, recognized,⁵ asserted or denied, or which was inconsistent with its existence:

(b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from.

¹ *Emperor v. Wahiduddin (No. 1)*, (1929) 32 Bom. L. R. 324, 54 Bom. 524.

² *Reg. v. Sakharam Mukundji*, (1874) 11 B. H. C. 166.

³ *Booth v. Emperor*, (1918) 41 Cal. 545.

⁴ *Abdul Rahim Khan v. Fakir Mohammad Shah*, [1945] Nag. 518.

⁵ Norton, 124.

ILLUSTRATION.

The question is whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

COMMENT.—Principle.—The cases this section is intended to meet are those in which the right or custom in question is regarded as capable of surviving repeated instances of its assertion and denial, where transactions may be supposed to have gone on modifying, asserting, denying, creating, recognizing it, or being inconsistent with its existence, leaving it, after all that has been given in evidence, fair matter for judicial consideration, as to whether the Court should or should not decree it.¹

1. 'Right'.—The rights contemplated by this section are plainly conceived as admitting of proof by cumulative instances and transactions, and not by a single and decisive and final way, namely the terms of a document. The whole context indicates that the section is dealing with continuing rights which may be interrupted without being necessarily destroyed. The term 'right' comprehends every right known to the law.² It includes both corporeal and incorporeal rights including 'a right of ownership'.³ This is the view of the Bombay, Madras and Allahabad High Courts. The Calcutta High Court has, however, held that the term 'right' includes only incorporeal rights.⁴ But its decisions are conflicting.⁵ The Patna High Court agreed with the Bombay, Madras and Allahabad High Courts in one case,⁶ but a single Judge has adopted in a subsequent case the view of the Calcutta High Court.⁷

The section is not confined to public rights but covers private rights also, e.g., see the illustration to the section.

2. 'Custom'.—A custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law.⁸ The English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" does not apply to conditions in India. A custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established

¹ *Mahomad v. Hasan*, (1906) 31 Bom. 143, 9 Bom. L. R. 65.

² Per Beaman, J., in *Mahamad v. Hasan*, (1906) 31 Bom. 143, 154, 155, 9 Bom. L. R. 65, 75.

³ *The Collector of Gorakhpur v. Palakdhari Singh*, (1889) 12 All. 1, F.B.; *Ranchhodas Krishnadas v. Bapu Narhar*, (1886) 10 Bom. 439; *Lakshman v. Amrit*, (1900) 24 Bom. 591, 599, 2 Bom. L. R. 386; *Ramasami v. Appavu*, (1887) 12 Mad. 9; *Venkatasami v. Venkatreddi*, (1891) 15 Mad. 12; *Vythilinga v. Venkatachala*, (1892) 16 Mad. 194.

⁴ *Gujju Lall v. Fatteh Lall*, (1880) 6 Cal. 171, F.B.; *Kalidhun Chuttapadhya v. Shiba Nath Chuttapadhya*, (1882) 8 Cal. 483, 505, F.B.

⁵ See *Tepu Khan v. Rajani Mohun Das*, (1898) 25 Cal. 522, F.B., and the judgment of Mitter, J., in *Gujju Lall v. Fatteh Lall*, sup.

⁶ *Sabran Sheikh v. Odoy Mahto*, (1922) 1 Pat. 375.

⁷ *Ram Kishun v. Niranjan Pande*, (1932) 12 Pat. 285.

⁸ *Hurpurshad v. Sheo Dyal*, (1876) 3 I. A. 259, 285.

before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.¹

A custom to be recognized by a Court should be—

- | | |
|-----------------------------|----------------------------------|
| (1) Ancient, | (5) compulsory and not optional, |
| (2) continuous and uniform, | (6) peaceable, and |
| (3) reasonable, | (7) not immoral. |
| (4) certain, | |

The customs which will be recognized under the Act will be—

- (1) general, e.g., customs common to a class of people living in the same district or belonging to the same caste or community;
- (2) public, i.e., any custom which is a matter of public interest;
- (3) private, e.g., family customs and usages. The burden of proving a custom lies on the party setting it up.

In order to prove a custom—

(1) The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those *following it that they were acting in accordance with law*, and this conviction must be inferred from the evidence. Oral evidence of witnesses who depose to having heard of the custom from their deceased ancestors is admissible.²

(2) Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible, but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.³

A trade usage or custom may be proved in the same way as a family custom, except that it is unnecessary to show that such a custom is either ancient or continuous. A trade usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well-known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.⁴

3. 'Transaction.'—A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons.

Whether judgments not *inter partes* (between the same parties) are admissible in evidence under this section as 'transactions' [cl. (a)] or 'particular instances' [cl. (b)] gave rise to conflicting decisions,⁵ but, in view of subsequent pronounce-

¹ *Subhani v. Nawab*, (1940) 43 Bom. L. R. 432, [1941] Lah. 154, 68 I. A. 47.

² *Sri Krishna Datt v. Ahmadi, Bibi*, (1934) 57 All. 588.

³ *Gopalayyan v. Raghupatiyyan*, (1873) 7 M. H. C. 250, 254.

⁴ *Juggomohun Ghose v. Manickchand*, (1859) 7 M. I. A. 263, 282.

⁵ *Guju Lall v. Fatteh Lall*, (1880) 6 Cal. 171, F.B. Approved of in *Sunder Nath Pal Chowdhry v. Brojo Nath*

Pal Chowdhry, (1886) 13 Cal. 352, F.B.; *Subramanyan v. Paramaswaran*, (1887) 11 Mad. 116; *Nalakanta v. Imamsahib*, (1892) 16 Mad. 361; *Ranchhodas Krishnadas v. Bapu Narhar*, (1886) 10 Bom. 439; *Ram Kishun v. Niranjan Pande*, (1932) 12 Pat. 285; *Indar Singh v. Fateh Singh*, (1920) 1 Lah. 540; *Shankar v. Kesheo*, (1929) 26 N. L. R. 33, F.B. Not approved of in *The Collector of Gorakhpur v. Palakdhari Singh*, (1889) 12 All. 1, F.B.;

ments of the Judicial Committee, under certain circumstances, in certain cases, the judgment in a previous suit, to which one of the parties in a subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit.¹

The Privy Council has admitted in evidence judgments and orders not between the same parties.² A decree eighty years old dismissing a suit on the ground that the defendants had *mokurari* tenure was admitted as cogent evidence of their ancient possession, of the rate of rent paid, and of their title having been long ago asserted successfully.³ Police orders made under the provisions of the Criminal Procedure Code to prevent breaches of the peace in cases of dispute as to immovable property are held admissible in evidence under this section to show the fact that such orders were made. This necessarily makes them evidence of the facts appearing on the orders themselves, viz., who the parties to the dispute were; what the land in dispute was; and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against anyone, when the fact of possession at the date of the order has to be ascertained.⁴

Judgments not *inter partes* might be admissible in evidence as establishing a particular transaction, if any, by which the relevant right was asserted, recognised, claimed or denied, but in no case the reasons and the findings of fact arrived at in them would be admissible in evidence.⁵

The judgment of a Court is a document which usually contains both a description of the litigation, and the adjudication with the reasons for the adjudication. The narrative given in a judgment not *inter partes* of the nature of the litigation, the names of the parties and witnesses, the rival assertions or claims, and the character of the evidence oral and documentary is admissible under s. 35 to prove those facts, if relevant under s. 13 or other section. The Court's written judgment is often the most convenient means of proof, and, in the case of an old proceeding, sometimes the only available proof of these matters. Thus a statement in a decree that a certain pedigree table had been put in evidence by one of the parties was admitted in evidence of that fact under s. 35 in a subsequent suit between other parties.⁶

In the case of an adjudication not *inter partes* its existence alone is admissible under s. 43, and only in cases where such existence is relevant. Its correctness or incorrectness is not admissible, nor are the reasons on which it is based. Although a judgment (i.e. an adjudication) in a proceeding A v. B may perhaps be used in a subsequent proceeding A and B v. C as evidence that there was a decision on a certain point, it cannot be used as evidence that there was an accurate decision based on true facts. Parties A and B sued party C for a declaration that they were

Tepu Khan v. Rajani Mohun Das, (1898) 25 Cal. 522, F.B.; *Lakshman v. Amrit*, (1900) 24 Bom. 591, 2 Bom. L. R. 386; *Govindji v. Chhotatal*, (1900) 2 Bom. L. R. 651; *Mahomed v. Hasan*, (1906) 31 Bom. 143, 9 Bom. L. R. 65; *Devidatt v. Shriram Narayandas*, (1931) 56 Bom. 324, 34 Bom. L. R. 236; *Sreemati Purnima Debya v. Nand Lall Ojha*, (1931) 11 Pat. 50.

¹ *Ram Ranjan Chuckerbutty v. Ram Narain Singh*, (1894) 22 I. A. 60, 22 Cal. 533; *Bitto Kunwar v. Kesho*

Pershad, (1897) 24 I. A. 10, 19 All. 277.

² *Ibid.*

³ *Ram Ranjan Chuckerbutty v. Ram Narain Singh*, sup.

⁴ *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani*, (1901) 29 I. A. 24, 33, 4 Bom. L. R. 187, 29 Cal. 187.

⁵ *Gajanfar Ali Khan v. Province of Assam*, [1944] 1 Cal. 203.

⁶ *Collector of Gorakhpur v. Ram Sundar Mal*, (1934) 61 I. A. 286, 36 Bom. L. R. 367, 56 All. 468.

owners of the sub-soil of a village in the Achra estate possessed by C. C asserted that Achra estate belonged to him by partition of the zamindari of Pandara Raj between his predecessors and those of A and B. A and B replied that there had been no partition, and that the Pandara Raj (of which Achra admittedly had once been a portion) was impartible. C sought to use as evidence of the alleged partition a judgment in a suit of 1793 B v. A. B's predecessor had sued for partition of the Pandara Raj, and had been successful. In that suit the instance of Achra had been quoted in evidence to prove the Raj partible, and the Court decided that Achra had been separated by partition, and took the fact into consideration in arriving at its decision. C's predecessors were not parties to the suit. Their Lordships held that the judgment in the 1793 suit was only admissible under the provisions of ss. 13 and 43 of the Evidence Act as establishing a particular transaction in which the partibility of the Pandara Raj was asserted and recognized, viz., the partition resulting from the 1793 suit.¹

A finding of fact arrived at on the evidence in one case is not evidence of that fact in another case between different parties.² The English rule that, so far as regards the truth of the matter decided, a judgment is not admissible evidence against one who is a stranger to the suit, applies in India. In a suit for possession of land a judgment in a previous suit, though admissible as evidence of assertion of a right to the land, is not evidence of the right as against a stranger. The plaintiff claimed to be owner of land in the defendant's possession, and sought to use as evidence of his ownership a previous judgment in his favour against other parties, and a map on which it was based. It was held that the judgment, with the plaintiff preceded it, and the steps in execution which followed, were evidence of a previous assertion of the right claimed, and were thus admissible evidence of the right, but that the fact of a person not in possession of land having claimed several years previously to have been entitled to it was not by itself serious evidence of the right.³ Where the right of a party has been concluded by a judgment that judgment is admissible to prove that fact.⁴

4. 'Claimed.'—This word indicates that the right is asserted to the knowledge and in the presence of the person whose right will be affected by the establishment of the claim. The mere assertion of a right in a document to which the person against whom the right is asserted is not a party and of which he knows nothing is not to claim the right.⁵

5. 'Recognised.'—Judicial recognition of a custom has been held to be relevant under this section as an instance of the custom being recognised.⁶ But a judicial decision is far from having the same importance as a clear-cut instance of custom recognised by the parties themselves.⁷

Cases.—In deciding a suit for damages arising from a malicious prosecution, the Judge treated the judgment of the Magistrate and the evidence given before

¹ *Gobinda Narayan Singh v. Sham Lal Singh*, (1931) 53 I. A. 125, 136, 33 Bom. L. R. 885, 58 Cal. 1187; *Devadatt v. Shriram Narayandas*, (1931) 56 Bom. 324, 34 Bom. L. R. 236.

² *Gopika Raman Roy v. Atal Singh*, (1929) 56 I. A. 119, 31 Bom. L. R. 734, 56 Cal. 1003, followed in *Shankar v. Kesheo*, (1929) 26 N. L. R. 33, F.B.

³ *Kesho Prasad v. Bhagjogna Kuer*, (1937) 39 Bom. L. R. 731, 16 Pat. 258, L. E.—3.

P.C.

⁴ *Maroti v. Jagannathdas*, [1940] Nag. 699.

⁵ *Raja Sri Sri Jyoti Prasad Singh Deo v. Bharat Shah Babu*, (1935) 15 Pat. 260.

⁶ *Mst. Janat Bibi v. Ghulam Hussain*, (1934) 16 Lah. 307.

⁷ *Dewan Singh v. Mst. Santi*, (1936) 17 Lah. 809.

the Magistrate, in the prosecution complained of, as evidence in the case. And looking at the judgment of the Magistrate as being a record of the facts found, the Judge came to the conclusion that the plaintiff was not present at the time when the alleged offence was committed; and decreed the plaintiff's claim. On appeal, it was held that it was not permissible to the Judge to utilise the judgment of the Magistrate in the way he did; and that s. 43, 13 or 11 of the Evidence Act did not apply to the case.¹

14. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.

ILLUSTRATIONS.

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(b) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.

(c) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

¹ *Gulabchand v. Chumilal*, (1907) 9 Bom. L. R. 1134.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(l) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms are relevant facts.

(m) The question is, what was the state of A's health at the time an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant.

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact that A on other occasions shot at B is relevant as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant.

(p) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant.

COMMENT.—This section declares that facts which show the existence of any state of (1) mind, viz., intention, knowledge, good faith, negligence, rashness, ill-will, good-will, or (2) body or (3) bodily feeling are relevant when such state of mind or body is in issue or relevant.

Intention, knowledge, and similar other states of mind, are matters of cogent inquiry in criminal cases; in civil cases they are very material, e.g., in cases of malicious prosecution, fraud, negligence, etc.

Principle.—Where the question is as to knowledge, intent, motive, or any bodily or mental state, evidence of other acts done, showing the existence of such knowledge, intent, motive, or bodily or mental state, are admissible, even though it involves the proof of other crimes. Evidence admitted for such purpose must be confined within the limits for which it is admitted.

When the existence of a mental or bodily state or bodily feeling is in issue or relevant, then the facts from which the existence of such mental or bodily state or bodily feeling may be inferred are relevant. See the illustrations. Illustrations (e), (i) and (j) deal with *intention*; (a), (b), (c) and (d), with *knowledge*; (f), (g), and (h), with *good faith*; (n), with *negligence and knowledge*; (k), (l) and (m), with *mental and bodily feeling*. To explain states of mind evidence is admissible though it does not otherwise bear upon the issue to be tried.

The principle on which evidence of similar acts is admissible is not to show that because the defendant has committed one crime therefore he would be likely to commit another, but to establish the *animus* of the act and rebut, by anticipation, the obvious defences of ignorance, accident, mistake or other innocent state of mind.¹

This section consists of the collection of cases in which the strict rules of evidence are somewhat relaxed by the admission of collateral circumstances, where it is necessary to show a particular state of mind. Where a man is on his trial for a specified crime, such as uttering a forged note or coin or receiving an article of stolen property, the issue is whether he is guilty of that specific act. To admit, therefore, as evidence against him other instances of a similar nature, is clearly to introduce collateral matter. This cannot be with the object of inducing the jury to infer that, because the accused has committed a crime of a similar description on other occasions, he is guilty of the present; but to anticipate the defence that he acted innocently and without any guilty knowledge, or that he had no intention or motive to commit the act.²

In *Reg. v. Parbhudas*³ West, J., said : "The possession by an accused of several other articles deposed to have been stolen would, no doubt, have some probative force on the issue of whether he had received the particular articles which he was charged with having dishonestly received, and the receipt or possession of which he denied altogether, yet, in the first illustration to Section 14, it is set forth as a preliminary to the admission of testimony as to the other articles that 'it is proved that he was in possession of [the] particular stolen article.' The receipt and posses-

¹ Phipson, 7th edn., p. 167.

² Norton, 131.

(1874) 11 B. H. C. 90, 91, 92.

sion are not allowed to be proved by other apparently similar instances, only the guilty knowledge which can be inferred satisfactorily through a conscious or unconscious application of the law of probabilities from a multiplication of the fractions representing in each case the ratio of probable ignorance to probable knowledge of how the goods had been come by. Illustration (o) to the same section makes a previous attempt by the accused to shoot the person murdered, evidence of the accused's intention, but not of the act that caused the death; yet it is certain that on the issue of whether *A* actually shot *B* or not, the fact that he had previously shot at him, would have some probative force; so, too, would proof of a general malignity of disposition by evidence 'that *A* was in the habit of shooting at people, with intent to murder them', yet this evidence is excluded even as proof of *A*'s intention, either as too remotely connected with the particular intention in issue or as raising collateral questions, which could not properly be resolved in the case." In this case the accused was charged with having forged a promissory note and it was held that evidence that a number of documents apparently forged, or held in readiness for the purpose of forgery, were found in the prisoner's possession was not admissible.¹ In distinguishing this decision in a subsequent case the same learned Judge observed: "The possession of documents of unknown character is a common occurrence, and they could not be pronounced forgeries without a trial of the fact. If the papers, however, had all been of an identical and peculiar pattern, that would have afforded some ground of inference under particular circumstances".² In this case evidence of the possession and attempted disposal of coins of an unusual kind was, therefore, considered relevant on a charge of uttering such coins soon afterwards when the *factum* of uttering was denied.³ Similarly, where the accused was charged under s. 206 of the Indian Penal Code with fraudulently transferring three properties to three different persons on a certain day, in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day, and apparently with the same object, this evidence was admissible to prove either that all those transfers were parts of one entire transaction, or that the particular transfers which were specified in the charge were made with a fraudulent intent.⁴ Where a man is prosecuted for making speeches promoting hatred and enmity between different communities (s. 153A, Indian Penal Code), previous speeches made by him are admissible in evidence against him to show his intention in making the speeches which are the subject-matter of the proceedings.⁵

Scope.—This section applies to cases "where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as for instance in actions of slander or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations... show with sufficient clearness the sort of cases in which this evi-

¹ *Reg. v. Parbhudas*, (1874) 11 B. H. C. 90.

² *Queen-Emress v. Nur Mahomed*, (1883) 8 Bom. 223, 226.

³ *Ibid.*

⁴ *Queen-Emress v. Vajiram*, (1892) 16 Bom. 414.

⁵ *Jagannath Prasad v. Crown*, [1942] Nag. 62.

dence is receivable. But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts* and *not upon the state of a man's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion, by shewing that he committed similar crimes on other occasions."¹

Explanation 1.—Illustrations (n), (o) and (p) explain the purport of this Explanation. Under this Explanation evidence of general reputation is excluded. The evidence relating to the state of mind of a person must show that the state of mind exists not generally but in reference to the particular matter in question. Evidence of general disposition, habit or tendencies is inadmissible.² Anything having a distinct and immediate reference to the particular matter in question is admissible.³ See illustrations (a) and (b).

Explanation 2.—This Explanation distinctly states that, where the previous commission of an offence is relevant, the previous conviction of such person should also be a relevant fact. The Explanation is a particular application of the general rule contained in the section itself. Previous convictions become relevant when the existence of any state of mind, or body, or bodily feeling, is in issue or relevant.⁴ See illustrations (e) and (f) to s. 43.

CASES.—On the trial of a man and his wife for the murder of his mother by poison, the female prisoner having lived as servant in the family during the life of her husband's former wife, evidence was admitted of the circumstances under which the former wife had died of poison.⁵

Where the prosecution tendered in evidence a copy of a letter written by the accused to the editor of a newspaper sending for publication a pamphlet charged as seditious and the letter indicated the writer's motive, it was held that the copy was admissible under s. 9 and this section as evidence of the accused's intention.⁶ Similarly, a writing made subsequent to the writing regarding which the writer was charged with sedition and found in his possession was held admissible under this section as evidence of intention.⁷

But in a case of conspiracy to commit dacoity, facts showing that the object of the illegal association during a period of several months prior to the dacoity in question had been the commission of thefts and other discreditable acts were held inadmissible under this section to throw any light on the existence of an intention to commit, or to engage in a conspiracy to commit, the dacoity charged.⁸

The accused conspired together, murdered a person and implicated their enemies into the offence. The persons so implicated absconded, but the truth came to light and the accused were tried for the offence. At the trial evidence was led to show that on two previous occasions the accused had committed murders but had falsely

¹ Per Garth, C. J., in *Empress v. M. J. Vyapoory Moodeliar*, (1881) 6 Cal. 655, 659, 660; *Nga Po So v. King-Emperor*, (1908) 1 U. B. R. (1907-1909) (Evi.) 1; *Ghandhi v. The King*, [1941] Ran. 566.

² See *Emperor v. Gangaram*, (1920) 22 Bom. L. R. 1274; *Emperor v. Haji Sher Mahomed*, (1921) 25 Bom. L. R. 214, 46 Bom. 958.

³ *Emperor v. Debendra Prosad*, (1909) 36 Cal. 573.

⁴ *Emperor v. Alloomiya Husan*, (1903) 28 Bom. 129, 135, 5 Bom. L. R.

805. See *Wazir v. Queen-Empress*, (1895) P. R. No. 7 of 1895 (Cr.); *Nga Shree Hman v. Queen-Empress*, (1900) 1 U. B. R. (1897-1901) 144; *Nga San Bwin v. Queen-Empress*, (1892-1896) 1 U. B. R. 83.

⁵ *Regina v. Garner*, (1863) 3 F. & F. 681.

⁶ *Emperor v. Spratt* (No. 2), (1927) 30 Bom. L. R. 314.

⁷ *Emperor v. Spratt* (No. 3), (1927) 30 Bom. L. R. 315.

⁸ *Emperor v. Wahiduddin* (No. 1), (1929) 32 Bom. L. R. 324, 54 Bom. 524.

charged and got convicted some other enemies of the accused. It was held that such evidence was not admissible as it amounted to evidence of similar acts and therefore of habit on the part of the accused and was therefore inadmissible under ill. (o) and (p).¹

Explanation 1.—Where the accused were charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity, evidence of previous conviction of theft or of an order for giving security as the accused habitually committed thefts was held inadmissible on the ground that such evidence did not indicate an intention to commit the particular crime of which the accused were charged.²

Explanation 2.—Where a person was charged with the offence of belonging to a gang of persons associated for the purpose of habitually committing dacoity, it was held that proof of previous conviction was admissible having regard to the character of the offence attributed to the accused.³ A warrant was issued for the arrest of the accused under the Bombay Prevention of Gambling Act. In execution of this warrant, when the police entered into his room, no actual play was seen, but there were found playing cards on the ground, and ten persons including the accused were found sitting in a circle. Upon these facts the Magistrate convicted the accused of keeping a common gaming house. Amongst other facts he took into consideration the previous convictions of the accused under the Gambling Act. On appeal, it was held that the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.⁴ This case is of doubtful authority because the previous conviction is nothing more than evidence of bad character which is excluded by s. 54. The section does not extend to cases where the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind or feeling.

15. When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Facts bearing on question whether act was accidental or intentional.

ILLUSTRATIONS.

(a) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

¹ *Emperor v. Gangaram*, (1920) 22 Bom. L. R. 274. (1897) 1 C. W. N. 146.

² *Emperor v. Alloomiya Husan*, (1903) 28 Bom. 129, 5 Bom. L. R. 805, per Chandavarkar and Aston, (1921) 25 Bom. L. R. 214, 46 Bom. 958.

³ *Empress v. Naba Kumar Patnaik*, JJ., Jacob, J., dissenting.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

COMMENT.—Principle.—Where it is uncertain, whether an act was done with a guilty knowledge or intention or whether it was innocent or accidental, proof that it formed one of a series of similar acts raises the presumption that the act in question and the others, together forming a series, were done upon system, and were therefore not innocent or accidental. This section is an application of the general rule laid down in s. 14, and the words of the section as well as of illustration (a) show that it is not necessary that all the acts should form parts of one transaction, but that they should be parts of a series of *similar* occurrences.¹ For example under ill. (a) the fact that the shops of the same person insured against fire, were successively burnt down on different occasions is relevant to prove that the incidents were not accidental but part of a design.²

Section 14 provides that facts showing the existence of any state of mind, such as intention or knowledge, are relevant, when the existence of any such state of mind is in issue or relevant; and this section provides specifically for allowing evidence of similar occurrences, in each of which the person doing the act was concerned, whenever there is a question whether an act is done with a particular knowledge or intention.³ In this section, as in s. 14, the intention of the party is taken into account. But if there is no common link between the fact to be proved and the evidentiary fact, they cannot form a series. A regular system worked by the common intention should be proved.

Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.

Whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence may be given to prove that the accused has been concerned in a systematic course of conduct of the same specific kind and proximate in time to the conduct in question.⁴

CASES.—Arson.—Upon a trial for arson with intent to defraud an insurance company, evidence that the accused had made claims on two other insurance companies in respect of fires which had occurred in two other houses which he had occupied previously and in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident.⁵ Similarly, the fact that the shops of the same person insured against

¹ *Emperor v. Debendra Prosad*, (1909) 36 Cal. 573. See also *Emperor v. Panchu Das*, (1920) 47 Cal. 671, F.B.; *Ghandhi v. The King*, [1941] Ran. 566.

² *Nural Amin v. Emperor*, (1939) 1 Cal. 511.

³ *Emperor v. Harjivan Valji*, (1925) 50 Bom. 174, 182, 28 Bom. L. R.

115.

⁴ *Amrita Lal Hazra v. Emperor*, (1915) 42 Cal. 957; *Emperor v. Harjivan Valji*, (1925) 50 Bom. 174, 28 Bom. L. R. 115.

⁵ *Regina v. Gray*, (1866) 4 F. & F. 1102.

fire were successively burnt down on different occasions was held to be relevant to prove that the incidents were not accidental but part of a design.¹

Cheating.—On the trial of an indictment for endeavouring to obtain an advance from a pawn-broker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the accused had obtained an advance from a pawn-broker upon a chain which he represented to be a gold chain, but which was not so, and endeavoured to obtain from other pawn-brokers advances upon a ring which he represented to be a diamond ring but which, in the opinion of the witnesses, was not so. This ring was not produced. It was held that the evidence was properly admitted.²

On a charge against the accused of cheating by falsely representing that he was the agent of an estate and could procure for the complainant appointment to the vacant post of manager to the estate, and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, was held to be admissible under this section not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.³

A person employed as a clerk in charge of the renewal of licenses for hand-carts received Rs. 2 for each such renewal, whereas he ought to have taken Rs. 1-14. He was charged with cheating, and evidence was produced showing that he had taken two annas in excess from persons other than those named in the charge. It was held that such evidence was inadmissible either under s. 14 as the question of the accused's guilt did not depend upon the state of his mind or feelings but upon actual facts, or under this section because there was no question whether the act of the accused was accidental since he admitted that he knew what amount he was entitled to take from applicants for licenses.⁴

Libel.—In an action for libel instances of acts of the plaintiff more or less closely resembling the particular act of misconduct imputed to the plaintiff in the libellous statement are not admissible in evidence. The defendant must justify the libel as true in substance and in fact by proving its truth, not the truth of other acts and occasions having nothing to do with the one in question.⁵

Murder.—Where accused had been convicted of the wilful murder of an infant child which they had received from its mother on certain representations as to their willingness to adopt it, and upon payment of a sum inadequate for its support for more than a very limited period, and whose body the evidence showed had been found buried in the garden of a house occupied by them, the Court admitted evidence that several other infants had been received by the accused from their mothers on like representations and on like terms and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the accused.⁶ Similarly, where the Court had to decide whether a person was maliciously shot or whether the shooting was accidental, proof that the accused had at another

¹ *Nural Amin v. Emperor*, [1939] 1 Cal. 511.

² *The Queen v. Francis*, (1874) L. R. 2 C. C. R. 123.

³ *Emperor v. Debendra Prosad*, (1909) 36 Cal. 573; *Emperor v. Yakub Ali*, (1916) 39 All. 273.

⁴ *Emperor v. Abdul Wahid Khan*, (1911) 34 All. 93.

⁵ *Nadirshaw H. Sukhia v. Pirojshaw R. Ratnagar*, (1913) 15 Bom. L. R. 130.

⁶ *Makin v. Attorney-General for New South Wales*, [1894] A. C. 57.

time shot at the same person was considered relevant.¹ Where a woman was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible.²

Robbery.—P introduced himself as a Raja's son to a prostitute who passed into his keeping. He then introduced G as his door-keeper and both visited her house till the night of December 9, 1914, when she was found next morning to have been murdered and robbed. P and G were tried on charges of murder, conspiracy to rob, theft, and abetment of each other in the commission of the theft and murder. It was held that evidence that P had similarly introduced himself as a wealthy man in 1915 and 1918 to three other prostitutes who each became his mistress, that he then introduced G as his door-keeper, that both visited the women, and suddenly disappeared, and that their disappearance was followed by discovery, by the women, in each case, of the loss of their money or ornaments, was not admissible under s. 9, 14 or 15. Section 9 did not apply for the purpose of proving identity as the murder and theft took place in December, 1914, and the subsequent incidents in 1915 and 1918. Section 14 was not applicable, as the evidence of the subsequent occurrences did not show the state of mind of the accused towards the murdered woman. The first explanation and ill. (i), (j) and (o) to that section excluded such evidence. Section 15 was not applicable as there was no question of the acts of murder and theft being accidental or intentional or done with a particular knowledge or intent, but that they were plainly intentional. Evidence of the subsequent incidents was also not admissible under s. 11.³

16. When there is a question whether a particular act was done, the existence of any course of business,¹ according to which it naturally would have been done, is a relevant fact.

Existence of course of business when relevant.

ILLUSTRATIONS.

(a) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

COMMENT.—Principle.—Under this section when the ordinary course of a particular business is proved, the Court is asked to presume that, on the particular occasion in question, there was no departure from the ordinary and general rule. For instance, if letters properly directed to a gentleman be left with his servant it is only reasonable to presume *prima facie* that they reached his hands. Section 114, illustration (b), lays down that the Court may presume that the common course of business has been followed in particular cases. This presumption is an application of the general maxim *omnia præsuntur rite esse acta* (all acts are presumed to be rightly done), and is based on the fact that the conduct of men in official and

¹ *Voke's Case*, (1823) Russ. & Ry. 630.
531.

² *Reg. v. Cotton*, (1873) 12 Cox 47 Cal. 671, F.B.
³ *Emperor v. Panchu Das*, (1920) 400; *Reg. v. Roden*, (1874) 12 Cox

commercial matters is, to a great extent, uniform. In such cases there is a strong presumption that the general regularity will not, in any particular instance, be departed from.

1. 'Course of business.'—This must mean the ordinary course of a professional avocation or mercantile transaction or trade or business. The section covers both private and public offices.¹ Illustration (a) relates to the former; illustration (b), to the latter, viz., the post office. The usage in a private house, however methodical, cannot convey the same weight as the ordinary routine of office.

CASES.—Registered letters.—A person refusing a registered letter sent by post cannot afterwards plead the ignorance of its contents.² Similarly, if a letter is put into a post office, that is *prima facie* evidence, till rebutted, that the addressee received it in due course. The post marks on letters are considered as evidence of the dates and places mentioned thereon. Where a notice to quit was sent by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it had been despatched, and on the cover there was an endorsement purporting to be by an officer of the post office stating the refusal of the addressee to receive the letter, it was held that this was sufficient service of notice.³

ADMISSIONS.

Admission defined. 17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

COMMENT.—An 'admission' is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true. Admissions are admitted because the conduct of a party to a proceeding, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue. Admissions are very weak kind of evidence and the Court may reject them if it is satisfied from other circumstances that they are untrue.⁴

It is immaterial to whom an admission is made. An admission made to a stranger is relevant. Admissions are as much binding on the Crown as ordinary persons. In English law the term 'admission' is used in civil cases; whereas the term 'confession' is used in criminal cases as acknowledgment of guilt. This distinction is not maintained in the Evidence Act, and ss. 17 to 22 are applicable to civil as well as criminal cases. Statements by the accused are admissions under ss. 17 and 18, and *prima facie* evidence against the maker, but not in his favour.⁵ The word 'confession' has not been defined anywhere. A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime.⁶ Confession would include an admission

¹ *Ningawa v. Bharmappa*, (1897) 23 Bom. 63, 66.

² *Loolf Ali Meah v. Pearee Mohun Roy*, (1871) 16 W. R. (Civil) 233.

³ *Jogendra Chunder Ghose v. Dwarka Nath Karmokar*, (1888) 15 Cal. 681.

⁴ *Latafat Husain v. Lala Onkar*

Mal, (1934) 10 Luck. 423; *Raja Partab Bahadur Singh v. Raja Rajgan Maharaja Jagatjit Singh*, (1936) 12 Luck. 371.

⁵ *Azimuddy v. Emperor*, (1926) 54 Cal. 237.

⁶ *Queen-Empress v. Babu Lal*, (1884) 6 All. 509, 539, F.B.

of incriminating circumstances. Thus a confession is one species of admission, namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him, or some fact essential to the charge. Confessions are a sub-species of statements, and a species of admissions. A confession to be admissible in evidence must be voluntary.

Every admission made by an accused person is not in the view of the law a confession, nor can it be held that admissions mean only statements made by parties to civil proceedings, and do not include statements made by parties in criminal proceedings. Every statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact made by an accused person is an admission under ss. 17 and 18, and under s. 19 an admission may be proved as against the person who makes it unless, under some provision of the Evidence Act or other law, it is rendered inadmissible. Under ss. 24-26 statements made by accused persons are inadmissible, subject to the provisions of ss. 27-29, when such statements are confessions.¹ A confession which is inadmissible may yet for other purposes be admissible as an admission under s. 18 against the person who makes it in civil matters.² Thus, admission of guilt by a person to a police officer, though not receivable in evidence in a criminal trial, may be proved in civil proceedings as an admission under this section and ss. 18 and 21.³

Admissions may be oral or contained in documents, e.g., letters, depositions, affidavits, plaints, written statements, deeds, receipts, horoscopes. Admissions may be implied from the acquiescence of a party. The general rule is that admissions are admissible against the party making them and not against any other party. The exceptions to this rule are mentioned in ss. 18 to 20.

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

Admission by party to proceeding or his agent;

Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

By suitor in representative character;

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

By party interested in subject-matter;

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

By person from whom interest derived.

are admissions, if they are made during the continuance of the interest of the persons making the statements.

¹ *Ilahi Bakhsh v. The Empress*, (1886) P. R. No. 16 of 1886 (Cr.); *Raj Mal v. The Empress*, (1879) P. R. No. 3 of 1880 (Cr.); *Shere Singh v. The Empress*, (1881) P. R. No. 21 of

1881 (Cr.).

² *Queen-Empress v. Tribhovan Manekchand*, (1884) 9 Bom. 131, 134.

³ *Bishen Das v. Ram Labhaya*, (1915) P. R. No. 106 of 1915 (Civil).

COMMENT.—Sections 18 and 19 indicate the persons by whom an admission must be made.

Statements by the accused are admissions under s. 18.¹

Section 18 lays down five classes of persons who can make admissions—

- (1) Party to the proceeding.
- (2) Agent authorized by such party.
- (3) Party suing or sued in a representative character making admissions while holding such character.
- (4) Person who has any proprietary or pecuniary interest in the subject-matter of the proceeding during the continuance of such interest.
- (5) Person from whom the parties to the suit have derived their interest in the subject-matter of the suit during the continuance of such interest.

(1) **Party to the proceeding.**—A statement made by a party in a former suit between the same or different parties is admissible. The proceeding may be civil or criminal.

“When several persons are *jointly* interested in the subject-matter of the suit, the general rule is that the admissions of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued, or whether an action be brought in favour of or against one or more of them separately, provided the admissions relate to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.”²

A statement made by a suspect before the coroner is admissible under this section and s. 21.³

(2) **Agent.**—The admissions of an agent are admissible because the principal is bound by the acts of his agent done in the course of business and within the scope of his authority. A statement made by an agent whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized to make it, is admissible though not on oath,⁴ e.g., a statement by an agent before a settlement officer that his principal was a bastard.⁵ Before the statements of an agent can be relevant as admissions, the fact of agency must be proved.

Counsel, pleader, attorney.—Admissions of facts made by a pleader in the conduct of a suit on his client's behalf are binding on the client.⁶ But a party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law.⁷ An admission by a counsel or a pleader on a point of law cannot, therefore, bind the client.⁸ A pleader cannot give up any portion of his client's case without express authority, nor is he entitled to admit the claim of the other party. The admissions of a party's solicitors before the commencement of litigation are not relevant. The Madras High Court is of opinion that a pleader

¹ *Azimudday v. Emperor*, (1926) 54 Cal. 237.

² Taylor, 12th Edn., s. 743, p. 475; *Meajan Maibar v. Alimuddi Mia*, (1916) 44 Cal. 130, 143, 144.

³ *Emperor v. Rammath Mahabir*, (1925) 28 Bom. L. R. 111, 50 Bom. 111.

⁴ *Govindji v. Chhotalal*, (1900) 2 Bom. L. R. 651.

⁵ *Raj Fateh Singh, Thakur v. Baldeo*

Singh, Thakur, (1928) 3 Luck. 416.

⁶ *Khajah Abdool Gunnee v. Gour Monce Debia*, (1868) 9 W. R. (Civil) 375; *Mahadev v. Sundrabai*, (1901) 3 Bom. L. R. 467; *Emperor v. Banstlal Gangaram*, (1928) 30 Bom. L. R. 646, 52 Bom. 686.

⁷ *Narayan v. Venkatacharya*, (1901) 6 Bom. L. R. 434, 28 Bom. 403.

⁸ *Krishnaji v. Rajmal*, (1899) 24 Bom. 360, 2 Bom. L. R. 25.

is not competent to enter into a compromise on behalf of his client without his express authority to do so, but the Allahabad High Court has held that a counsel has such power.¹

Co-defendants.—An admission or a confession of judgment by one of several defendants in a suit is no evidence against another defendant. No defendant can, by an admission or consent, convey the right, or delegate the authority to one, for more than his own share in property.² Thus, the admissions by one defendant will not be relevant against a co-defendant, because it would be unjust to bind a co-defendant by the admission of another whom he has had no opportunity to answer or cross-examine; it would afford to the plaintiff opportunities of defeating his opponent by unfair means. Even a confession of judgment by one of several defendants is no evidence against another defendant.³

Partner.—Partners are agents of one another so far as the business of partnership is concerned. Where several persons are engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held admissible as evidence against the others.⁴ Each member of a firm, being the agent of the others for all purposes within the scope of the partnership business, admissions by one member are binding on all. Section 21 of the Indian Limitation Act is, to a certain extent, an exception to this rule.

Principal and surety.—"The admissions of a *principal* can sometimes (but only seldom) be received as evidence in an action *against the surety* upon his collateral undertaking. In these cases the main inquiry is whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*. If so, they are admissible; otherwise, they are not."⁵

Guardian.—The admissions of a guardian *ad litem*, or next friend, do not bind the minor. The guardian of an infant has no power to bind him by admissions. According to the Bombay and the Madras High Courts, a guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability in respect of, or pay in part the principal of, a debt, so as to extend the period of limitation against his ward, provided the guardian's act was for the benefit of the ward's property.⁶ The Calcutta High Court holds the contrary view.⁷

(3) **Party suing or sued in a representative character.**—This means trustees, executors, administrators, managers in the character of an executor or administrator, or the assignee of a bankrupt.

It is important that such persons must make 'the statement in their character of persons so interested.' A statement made by a trustee, executor or administrator, is not admissible against him when sued as trustee, etc., if it was made before he became trustee, etc. This principle is grounded on the fact that a state-

¹ *Jagapati Mudaliar v. Ekambara Mudaliar*, (1897) 21 Mad. 274; *Jang Bahadur Singh v. Shankar Rai*, (1890) 13 All. 272, F.B.

² *Lachman Singh v. Tansukh*, (1884) 6 All. 395; *Azizullah Khan v. Ahmad Ali Khan*, (1885) 7 All. 353.

³ *Aumirtolall Bose v. Rajoneekant Mitter*, (1874-75) 2 I. A. 118, (1875) 23 W. R. 214.

⁴ *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi*, (1885) 11 Cal. 588.

⁵ - Taylor, 12th Edn., Vol. I, s. 785, p. 494.

⁶ *Annapagauda v. Sangadyapa*, (1901) 3 Bom. L. R. 817, 26 Bom. 221, F.B.; *Kailasa Padiachi v. Ponnukannu Achi*, (1894) 18 Mad. 456.

⁷ *Chhato Ram v. Bitto Ali*, (1898) 26 Cal. 51.

ment against the interest of a person making it will not be made unless truth compelled it. But the fact that two persons have a common interest in the subject-matter does not entitle them to make admissions, respecting it, as against each other.¹

(4) **Person who has any proprietary or pecuniary interest.**—When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.²

An admission made by one of several parties in fraud of the others jointly interested will not bind the others.

(5) **Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit.**—Statements made either by parties interested or by persons from whom the parties to the suit have derived their interest are admissions only if they are made during the continuance of the interest of the persons making the statement. The admissions of a former owner of property after he has ceased to have any interest in it are not evidence against the party in possession.³ A, a landowner, filed a suit for ejection against B, a tenant. B alleged he was a permanent tenant at a fixed rent under an agreement with the original owner of the land, who was dead, and put in evidence statements made by the original owner after he had transferred his interest. It was held that the statements were inadmissible.⁴

This clause indicates that there ought to be a privity, i.e., mutual or successive relationship to the same rights of property. Privies are of three kinds:—

(1) Privies in blood, as an heir, an ancestor, and coparceners.

(2) Privies in law, as executor and testator, administrator and a person dying intestate.

(3) Privies in estate or interest, as vendor and purchaser, lessor and lessee, mortgagor and mortgagee, donor and donee.

The grounds upon which admissions are evidence against those in privity with the party making them are that they are identified in interest. Where it was proved that an agreement sued on was made by the plaintiff on behalf of himself and the other proprietors of a theatre, evidence of the declarations of one of such other proprietors was held admissible on the part of the defendant.⁵

19. **Statements made by persons whose position or liability it is necessary to prove as against any party to the suit,** are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if

Admissions by persons whose position must be proved as against party to suit.

they are made whilst the person making them occupies such position or is subject to such liability.

¹ Stephen's Dig., Art. 17.

² *Meajan Matbar v. Alimuddi Mia*, (1916) 44 Cal. 130, 143; Taylor, 12th Edn., s. 743, p. 475.

³ *Khenum Kuree Chowdhrair v. Gour Chunder Mojoondar*, (1866) 5

W. R. 267.

⁴ *Shwe Yat Aung v. Da Li*, (1916) 9 L. B. R. 27.

⁵ *Kemble v. Farren*, (1829) 3 C. & P. 628; Taylor, 12th Edn., Vol. I, s. 743, p. 475.

ILLUSTRATION.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

COMMENT.—The admission of a third person against his own interest when it affects his position or liability and when that position or liability has to be proved as against a party to the suit, is relevant against the party. Ordinary statements by strangers to a proceeding are not relevant as against the parties.

Object.—The object of this section is not to lay down that certain statements are relevant or admissible but merely to add to the category of persons by whom a statement may be made before it can be considered to be an admission within the terms of the Act.

Principle.—This section forms an exception to the rule that statements made by strangers to a proceeding are not admissible as against the parties. Thus, in an action by the trustees of a bankrupt, the latter's admissions, made before the act of bankruptcy, are admissible in proof of the petitioning creditor's debt.¹ Similarly, the admissions of a *cestui que trust* are evidence against a trustee as far as their interests are identical.²

The illustration exemplifies that when the liability of a person who is one of the parties to a suit depends upon the liability of a stranger to the suit, then an admission by the stranger in respect of his liability amounts to an admission on the part of that person.

The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another are in the nature of original evidence and not hearsay, though such person is alive and has not been cited as a witness.³

Scope.—The statements referred to in this section become admissible only provided that they satisfy the requirements of s. 17 as regards their nature and s. 21 or any of the following sections as regards their liability.

20. Statements made by persons to whom a party to the suit has expressly referred for information¹ in reference to a matter in dispute are admissions.

Admissions by persons expressly referred to by party to suit.

ILLUSTRATION.

The question is, whether a horse sold by A to B is sound.

A says to B—"Go and ask C; C knows all about it." C's statement is an admission.

COMMENT.—This section forms another exception to the rule that admissions by strangers to a suit are not relevant. Under it the admissions of a third person are also receivable in evidence against, and have frequently been held to

¹ *Appavu Chettiar v. Nanjappa Goundan*, (1913) 25 M. L. J. 329; 45. Taylor, 12th Edn., s. 759, Vol. I, p. 484; *Coole v. Braham*, (1848) 18 L. J. Ex. 105. ² *Harrison v. Vallance*, (1822) 1 Bing. 45. ³ *Ali Moidin v. Kombi*, (1882) 5 Mad. 289.

be in fact binding upon, the party who has expressly referred another to him for information in regard to an uncertain or disputed matter.¹

Principle.—If a reference is made over a disputed matter to a third person, not in the nature of a submission to arbitration, but rather as an aid to the settlement of the differences existing between the parties and to enable the parties themselves to effect a settlement on the information, in such cases the party is bound by the declaration of the person referred to in the same manner and to the same extent as if it was made by himself.²

1. 'Expressly referred for information.'—There must be an express reference for information in order to make the statement of the person referred to admissible. Such admissions come very near to the case of arbitration. In the application of this principle, it matters not whether the question referred be one of law or of fact, whether the person to whom reference is made have or have not any peculiar knowledge on the subject, or whether the statements of the referee be adduced in evidence in an action on contract, or in an action for tort.³

If one party in a cause offers to the other party to settle it, provided that a witness makes a statement on oath as to a certain fact in dispute, and the statement is made, it shall bind the party making the offer.⁴ Where the defendant said, "If C will say that he did deliver the goods, I will pay for them," it was held that C's statement was admissible and the defendant was bound by it.⁵

A prisoner was indicted for receiving stolen goods, knowing them to have been stolen. To prove his guilty knowledge, evidence was given that, being asked by the police as to the prices he had given, he said he did not then know, but his wife would make out a list of them, and next day she, in his presence, produced a list, which was received in evidence against him. It was held that it was admissible.⁶

21. Admissions are relevant and may be proved as against the person who makes them,¹ or his representative in interest;² but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

Proof of admissions against persons making them, and by or on their behalf.

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

¹ Taylor, 12th Edn., s. 760, p. 484.

⁴ *Lloyd v. Willan*, (1794) 1 Esp. 178.

² *Soloman v. Herne*, (1799) 2 Esp.

⁵ *Daniel v. Pitt*, (1806) 1 Camp.

695; *Williams v. Bridges*, (1817) 2 Stark. 42.

366n.

³ Taylor, 12th edn., s. 761, p. 485.

⁶ *Reg. v. Mallory*, (1884) 15 Cox

456.

ILLUSTRATIONS.

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

Of 1. A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

Of 1. A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta.

Of 1. He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

Of 2. A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

Of 3. He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

COMMENT.—This section lays down as a general rule that admissions are relevant and may be proved against the person who makes them or his representative in interest, and if duly proved, though not conclusive, are sufficient evidence of the facts admitted.¹ The effect usually given to admissions proved against persons who make them is destructive not constructive. Whether they are true or not does not matter. The effective point is that they destroy the force of inconsistent statements made later.

The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, the Court may decide the case in accordance with it. An erroneous admission does not bind the person making such admission.

Admissions cannot be proved by or on behalf of the person who makes them, or by his representative in interest, except

(1) when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under s. 32;

(2) when it consists of a statement of the existence of any state of mind or body made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable;

(3) when it is relevant otherwise than as an admission.

¹ *Maung Mya v. Ma Tha Ya*, (1899) 2 U. B. R. (1897-1901) 377.

Scope.—There is nothing in ss. 18 to 21 to suggest that they apply to civil cases only; they apply also to admissions in criminal cases.¹

The accused went to a police station and lodged a first information of murder, narrating the events preceding the commission of the offence and stating further how the offence was committed. It was held that the narrative of the antecedent events was admissible as admissions not amounting to confessions.² Illustration (a) exemplifies this rule. The principle laid down in this section must be taken subject to ss. 24, 25 and 26 of this Act and ss. 164 and 364 of the Criminal Procedure Code.³ A confession made to a Magistrate but not recorded by him, under s. 164 of the Code of Criminal Procedure, cannot be proved by tendering the oral evidence of the Magistrate.⁴

1. 'As against the person who makes them.'—The rule as regards statements made by a person is that they may be proved only when they are against him; otherwise a party may manufacture any amount of evidence in his own favour.⁵ Where the statements are against the interest of the person making them there is a natural presumption of truth, and they may be proved. A person, however, is not concluded by his statements unless they have been acted upon by the opposite party. Till they are acted upon it may be shown that they were mistaken or untrue.

An admission by a plaintiff of her marriage with a person made before there was any dispute about such marriage may be proved by or on behalf of her under cl. (1) of this section read with s. 32.⁶

First information given by a person who subsequently becomes an accused may be admissible in evidence as admission under this section provided it is not of the nature of a confession and does not come within the exception provided in ss. 24, 25, and 26, of the Evidence Act or is not hit by s. 162 of the Code of Criminal Procedure, 1898. Such statement may also be admissible under other sections of the Evidence Act, e.g., s. 8, explanation 1.⁷

A receipt is nothing but an admission by the party making it that he has received the amount specified in the document. It is an admission against his own interest and he is of course bound by it, and so are those who claim through or under him.⁸

2. 'Representative in interest.'—This expression will include those who are privies in blood, law or estate. The purchaser at an ordinary execution sale is in privy with, and is the representative in interest of, the judgment-debtor so as to be bound by the latter's admission.⁹ There is a distinction between the position of a purchaser in a private sale and in a public sale in execution of a decree. In the former he derives his title through, and cannot acquire a better title than, the vendor: in the latter he acquires his title by operation of law adversely to the judgment-debtor and so freed from all alienations and incumbrances effected by the debtor

¹ *Md. Bakhsh v. Crown*, [1941] Kar. 257.

² *Legal Remembrancer v. Lalit Mohan Singh Roy*, (1921) 49 Cal. 167; *Pakala Narayana Swamy v. King-Emperor*, (1937) 17 Pat. 15.

³ *Queen-Empress v. Bhairab Chunder Chuckerbutty*, (1898) 2 C. W. N. 702.

⁴ *Nazir Ahmad v. The King-Emperor*, (1936) 63 I. A. 872, 38 Bom. L. R. 987, 17 Lah. 629.

⁵ *Ramani Pershad Narain Singh v. Mahanth Adaitya Gossain*, (1903) 31

Cal. 380.

⁶ *Musammam Bashiran v. Mohammad Husain*, (1941) 16 Luck. 615.

⁷ *Nazir Abbas v. Raja Ajamshah*, [1947] Nag. 955.

⁸ *Akalsahu v. King-Emperor*, (1947) 26 Pat. 49.

⁹ *Ishan Chunder Sirkar v. Beni Madhub Sirkar*, (1896) 24 Cal. 62, F.B.; *Mahomed Mozuffer Hossein v. Kishori Mohun Roy*, (1895) 22 Cal. 909, 22 I. A. 129.

subsequently to the attachment of the property sold in execution.¹ But the purchaser in a public or a private sale acquires only the right, title and interest of the judgment-debtor with all its defects and the creditor takes the property subject to all equities which would affect it in the debtor's hands.

Exceptions.—Admissions cannot be proved by, or on behalf of, the person who makes them, because a person will always naturally make statements that are favourable to him. To this principle three Exceptions are laid down in the section :—

Exception 1.—This Exception makes admissible the statement made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question [s. 32 (1)]: see illustrations (b) and (c). The declarations of the deceased made on the day he was wounded, and when he believed he would not recover, were held admissible, though he did not die until eleven days afterwards, and though the surgeon did not think his case hopeless, and continued to tell him so until the day of his death.²

Exception 2.—The state of a man's mind or body is relevant under s. 14; and statements narrating such facts indicating the state of mind or body may be proved on behalf of a person narrating them. But such statements should have been made at or about the time when such state of mind or body existed: see illustrations (d) and (e). Section 14 merely declares that such statements are relevant. This clause shows that such facts or statements may be proved on behalf of the person making them, notwithstanding the general rule that persons cannot make evidence for themselves by what they choose to say.

Exception 3.—This Exception lays down that facts which are relevant under ss. 6 to 13 will not be rendered inadmissible because they may be proved on behalf of the person making them. Illustrations (d) and (e) refer to this Exception.

The Exception is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance as part of the *res gestæ* or as a statement accompanying or explaining a particular conduct but a statement which is inadmissible as an admission under the general rule can be made admissible as such by reference to this Exception.³

CASE.—Where defendants Nos. 2 and 4 sold a property to defendant No. 1, which they obtained under a partition, and subsequently colluded with the plaintiff and denied the partition as well as the sale, the statements made by them in a petition and a written statement filed by them in certain previous suits, which went to show that there had been a partition and they had changed their attitude, were held to be admissible as against them under cl. (3) of this section and s. 11 (2).⁴

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness

When oral admissions as to contents of documents are relevant.

¹ *Dinendronath Sannyal v. Ram-comar Ghose*, (1880) 8 I. A. 65, 75, 7 Cal. 107.

² *Mosley's Case*, (1825) 1 Mood. C. C. 97.

³ *Mrs. Alice Georgina Pashaud v. Mrs. Emma Bertha Pashaud Nixon*, (1930) 6 Luck. 44.

⁴ *Gyanmessa v. Mobarakannessa*, (1897) 25 Cal. 210.

COMMENT.—Principle.—The contents of a document which is capable of being produced must be proved by the instrument itself and not by parol evidence.

Oral admissions as to contents of a document are excluded under this section. They are, however, admissible when the party is entitled to give secondary evidence of the contents of such document under ss. 65 and 66. Such admissions are also admissible when the genuineness of the document produced is in question.

A written contract can only be proved by the production of the writing itself, and if the document is inadmissible from want of registration, no secondary evidence of the contract can be received. A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is secondary evidence, and cannot supply the place of the document itself.¹

English law.—The principle laid down in this section is a departure from English law which admits oral admissions of a party as to the contents of a document even when the document might have been produced as evidence against him.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given,⁽¹⁾ or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.² = *to be made bona fide - without view to compromise*

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

COMMENT.—Principle.—This section lays down that in civil cases an admission is not relevant when it is made (1) upon an express condition that evidence of it is not to be given, or (2) under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. The section gives effect to the maxim, *interest rei publicæ ut sit finis litium* (it is for the interest of the State that there should be an end of litigation). *Not a 15th sec =*

This section does not apply to criminal cases (see s. 29).

1. 'Express condition that evidence of it is not to be given.'—The section protects communications made 'without prejudice'. Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice are excluded on grounds of public policy. For, if parties were to be prejudiced by their efforts to compromise it would be impossible to attempt any amicable arrangement of differences.³ The expression 'without prejudice' means without prejudice to the writer of the letter if the terms he proposes are not accepted. It means this: "I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all".⁴ If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.⁴ If letters marked 'without prejudice' are tendered in evidence and the other party admits them, the admission implies that the privilege is withdrawn. Letters so marked show the writer's desire as to the privilege, but unless there are circum-

¹ *Sheikh Ibrahim v. Parvata Hari*, (1871) 8 B. H. C. (A. C. J.) 163.

² *Hoghton v. Houghton*, (1852) 15 Beav. 278.

³ *In re River Steamer Company*, (1871) L. R. 6 Ch. 822, 832.

⁴ *Walker v. Wilsher*, (1839) 23 Q. B. D. 335.

stances from which it can be inferred that the other party agreed to respect the privilege, the letters cannot be excluded under this section.¹

The reply to a letter written 'without prejudice' cannot be admitted in evidence even though not guarded in a similar manner. The words once used will exclude an entire correspondence.

The rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation.²

2. 'Under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.'—Such circumstances must be of such a character that the Court must naturally come to the conclusion that the parties agreed together that evidence of it should not be given. In a suit for rent, there was a talk of settlement between the plaintiff's pleader and one of the defendants when the suit was about to be instituted. It was held that the mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted was not in itself sufficient to prevent the conversation from being put in evidence.³

An admission made to a stranger, under whatever terms as to secrecy, is not protected by law from disclosure. *If condition is violated = admission =*

Explanation.—Under the Explanation the legal adviser of a party will not be prevented from giving evidence of any communication made in furtherance of any illegal purpose or any fact showing that crime or fraud has been committed since his employment.

24. A confession¹ made by an accused person² is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise³ having reference to the charge against the accused person, proceeding from a person in authority⁴ and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable⁵ for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature⁷ in reference to the proceedings against him.

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

COMMENT.—The substantive law of confession is contained in ss. 24 to 30 of the Evidence Act and the adjective law, in ss. 164, 364 and 533 of the Criminal Procedure Code. Confessions are received in evidence in criminal cases upon the same principle on which admissions are received in civil cases, namely, the presumption that a person will not make an untrue statement against his own interest. A man of sound mind and full age, who makes a statement in ordinary simple language and has not been the victim of malpractice, threat or inducement in making such statement, must be bound by the language of the statement and by its ordinary plain meaning and the act spoken of must be given its legal consequence.⁴ This section does not require positive proof as defined in s. 3 of improper inducement.

¹ *The Lucknow Improvement Trust v. P. L. Jaily & Co.*, (1929) 5 Luck. 465.

² *Madhavray v. Gulabbhai*, (1898) 28 Bom. 177, 180.

³ *Meagan Matbar v. Alimuddi Mia*, (1916) 44 Cal. 130.

⁴ Per Mcars, C. J., in *Raggha v. Emperor*, (1925) 23 A. L. J. R. 821, 826, F.B.

A well-grounded conjecture reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude a confession.¹

The confession of an accused is only relevant against himself, though s. 30 is an exception to this rule.

Principle.—According to this section a confession by an accused is irrelevant if it is caused by (1) inducement; (2) threat; or (3) promise. The inducement, threat, or promise should have (a) reference to the charge against the accused, (b) proceeded from a person in authority, and (c) sufficiently given the accused person reasonable grounds for supposing that by making the confession he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

A confession is relevant—

(1) if it is made after the impression caused by any such inducement, threat or promise has been fully removed (s. 28);

(2) if it is not made to a police officer (s. 25); or

(3) if it is made in the presence of a Magistrate when the accused is in the custody of a police officer (s. 26).

Under the English law confessions are divided into two classes: (i) judicial confessions; and (ii) extra-judicial confessions.

(1) Judicial confessions are those which are made before a Magistrate or in a Court in the course of legal proceedings.

Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or in a Court.

1. 'Confession'.—The word 'confession' has not been defined anywhere in the Act. A 'confession' is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.² A confession is a statement which either admits in terms the offence or at any rate substantially all the facts which constitute the offence.³ A declaration is not a confession if it is not made with an intention to confess, or if it does not amount to an admission of facts from which guilt is directly deducible.⁴ An incriminating statement which falls short of an absolute confession, but from which the inference of guilt follows, is a confession within the meaning of this Act.⁵

A confession, if proved satisfactorily to be voluntary and genuine, is legal and sufficient proof of the guilt of the accused without corroboration, but ordinarily the practice is to require some support for a confession, some corroboration from facts established outside the confession, and reasonable consistency with the surrounding circumstances about which there is no doubt. The confession must be looked at as a whole, and it would not be right to take isolated portions of it, and to consider whether any of them amounts to an admission of guilt or not.⁶ Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law.⁷ Where it is found that certain statements in the

¹ *Bhukin v. King-Emperor*, [1948] Nag. 147.

² *Stepher's Dig.*, 12th Edn., Art. 22; *Queen-Empress v. Babu Lal*, (1884) 6 All. 509, 539, F.B.; *Queen-Empress v. Nana*, (1889) 14 Bom. 260, F.B.; *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhaju Majhi*, (1929) 57 Cal. 1062.

³ *Dhanapati De v. Emperor*, [1944] 2 Cal. 312.

⁴ *Karu v. King-Emperor*, [1937] Nag. 524.

⁵ *Queen-Empress v. Nana*, sup.; *Hakiman v. King-Emperor*, (1905) P. R. No. 20 of 1905 (Cr.).

⁶ *Queen-Empress v. Jagrup*, (1885) 7 All. 646, 648; *Turab v. King-Emperor*, (1934) 10 Luck. 281.

⁷ *Emperor v. Narayan*, (1907) 9 Bom. L. R. 789, 801, 32 Bom. 111, F.B.

confession are false the entire confession need not be rejected for that reason.¹ A Court is at liberty to use the confession as it stands, and derive a deduction of the guilt of the man who made it even while rejecting portions of the confession which are false.² But, if it appears that the confession has been improperly induced, then the Court is bound to exclude it, no matter how true it may be.³

In England, when a doubt arises as to the admissibility of a confession, the Court has to decide whether it has been proved affirmatively to be free and voluntary. This principle, as laid down in *The Queen v. Thompson*,⁴ has not been approved of by the Bombay High Court in *Queen-Emp. v. Baswanta*.⁵ The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in this section.⁶ It is not sufficient to render a confession irrelevant under this section that there may have been added to it a statement which has been improperly induced by threat or promise. In order to make a confession irrelevant it must be shown that the confession itself was improperly induced.⁷ It is the duty of the Court to inquire very carefully into all the circumstances under which the confession was taken, and particularly as to the length of time during which the accused was in custody.⁸

A confession differs from an admission :

(1) Confession is a statement made by an accused person which is sought to be proved against him in a criminal proceeding to establish the commission of an offence by him ; while admission is usually applied to a civil transaction and comprises all statements amounting to admissions as defined in s. 18.

(2) A confession if deliberately and voluntarily made may be accepted as conclusive in itself of the matters confessed ;⁹ an admission is not a conclusive proof of the matters admitted, but may operate as an estoppel.

(3) A confession always goes against the person making it ; an admission may be used on behalf of the person making it under the Exceptions provided in s. 21.

(4) The confession of one of two or more accused jointly tried for the same offence can be taken into consideration against the co-accused (s. 30). But an admission by one of several defendants in a suit is no evidence against another defendant.

See Comment on s. 17, *supra*.

2. 'By an accused person.'—The words "accused person" include a person who subsequently becomes accused. A person who makes a statement when he is a suspect but not an accused person and subsequently becomes an accused, his statement will be regarded as a confession.¹⁰ When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence, and the statement is, therefore, a confession by an "accused person" within the meaning of this section.¹¹

¹ *Nirbhoy Nath v. Emperor*, (1926) 1 Luck. 417.

² *Mata Din v. King-Emperor*, (1929) 5 Luck. 255.

³ *Emperor v. Phagi*, (1906) 8 Bom. L. R. 697, 699.

⁴ [1893] 2 Q. B. 12.

⁵ (1900) 2 Bom. L. R. 761, 25 Bom. 168.

⁶ *Queen-Emp. v. Baswanta*, (1900) 2 Bom. L. R. 761, 25 Bom. 168.

⁷ *Emperor v. Narayan*, (1907) 9 Bom. L. R. 789, 801, 32 Bom. 11, F.B.

⁸ *Queen-Emp. v. Narayan*, (1901) 3 Bom. L. R. 122, 124, 25 Bom. 543.

⁹ *Queen-Empress v. Sangappa*, (1889) Unrep. Cr. C. 463, Cr. R. No. 22 of 1836 ; *Emperor v. Narayan*, *sup.*

¹⁰ *Emperor v. Bhagwandas Bisesar*, (1940) 42 Bom. L. R. 938, [1941] Bom. 27.

¹¹ *Santokhi Beldar v. King-Emperor*, (1932) 12 Pat. 241, F.B.

3. 'Appears to the Court to have been caused by any inducement, threat or promise.'—Inducement, threat or promise need not be expressed, but may be implied from the conduct of the person in authority, the declarations of the accused, or the circumstances of the case.¹

The word 'appears' is not so strong as the expression 'proved.'²

The section merely requires that if it "appears" to the Court, i.e., if circumstances create a probability in the mind of the Court that the confession was improperly obtained, it shall be inadmissible in evidence.³ It is not necessary to prove strictly that a confession was brought about by improper inducement. It is quite sufficient to exclude the confession, if circumstances are placed before the Court, which would make it appear that the confession was so induced.⁴ It is only when it appears to the Court that the confession has been made as a result of some inducement held out by a person in authority that it becomes irrelevant; a mere possibility of there having been some inducement is not sufficient.⁵

The threat to come under this section must be sufficient to give the accused grounds for supposing that, by making the confession, he would gain an advantage.⁶

When a promise, inducement or threat is held out or made to an accused person by or on behalf of the prosecutor, and as a result business books and documents are produced by the accused person, those books and documents stand on the same footing as an oral or written confession which is brought into existence by a promise, inducement or threat, and are inadmissible in evidence against the accused person at his trial.⁷

An approver's disclosure is in its very nature always the result of an inducement or promise, viz., the inducement to confess upon a promise of pardon and it is only when it is extorted as the result of undue duress, such as threats or violence that this section is applicable and the statement must be ruled out of evidence.⁸

A promise or threat made to one accused will not render a confession made by another, who was present and heard the inducement, irrelevant.⁹

4. 'Having reference to the charge against the accused person.'—'Charge' means a criminal charge or a charge of an offence in a criminal proceeding. The inducement, threat, or promise, must be with reference to the offence, with which the accused is charged. A confession obtained by an inducement relating to some collateral matter unconnected with the charge will not be excluded from evidence.

5. 'Person in authority'.—This expression does not mean a person having control over the prosecution of the accused.¹⁰ The test would seem to be, has the person authority to interfere in the matter under enquiry as, for example, a person engaged in the apprehension, detention or prosecution of the accused, or who is empowered to examine him;¹¹ and any concern or interest in it would be sufficient to give him that authority.¹² The belief of an accused that the persons to whom he made a confession were "persons in authority" is not sufficient to bring

¹ *Reg. v. Gills*, (1866) 11 Cox 69; *King-Emperor v. Akhileshwari Prasad*, (1925) 4 Pat. 646.

² *Khairu Mandal v. The Emperor*, (1929) 57 Cal. 649.

³ *Emperor v. Nazir*, (1932) 55 All. 91.

⁴ *Emperor v. Thakur Das Malo*, [1943] 1 Cal. 487; *Ragha v. Emperor*, (1925) 23 A. L. J. R. 821, F.B.; *Partap Singh v. The Crown*, (1925) 6 Lah. 415.

⁵ *Hashmat Khan v. The Crown*, (1934) 15 Lah. 856.

⁶ *S. N. Mukerjee v. Queen-Empress*, (1899) 1 U. B. R. (1897-1901) 147.

⁷ *Rex v. Baker*, [1941] 2 K. B. 381.

⁸ *Ram Nath v. The Crown*, (1928) 9 Lah. 608.

⁹ *Reg. v. Jacobs*, (1849) 4 Cox 54.

¹⁰ *Reg. v. Navroji Dadabhai*, (1872) 9 B. H. C. 358.

¹¹ *Santokhi Beldar v. King-Emperor*, (1932) 12 Pat. 241, F.B.

¹² *Emperor v. Kutub Bux*, (1929) 57 Cal. 488.

them within the term.¹

An attorney engaged in the investigation of a crime, for the purpose of getting up a prosecution, is a person clothed with authority to offer such an inducement.² So is a police officer invested with the powers of an additional District Magistrate.³ Similarly, a Sub-Inspector's man, holding out an inducement as from the Sub-Inspector to the accused that the Sub-Inspector would treat them leniently if they confessed, is a person in authority and the confession so made is inadmissible.⁴ Where a confession was made to a tahsildar who was a person of some influence in the village but had no interest in the prosecution of the accused other than the interest which every citizen has in the maintenance of law and order, and the confession was made in consequence of questions put, and a promise made by him, it was held that the tahsildar not being a person empowered to examine the accused or one who could legitimately influence the course of proceeding, the confession was not excluded by this section.⁵

6. 'Grounds which would appear to him reasonable.'—The word 'appear' imports judicial discretion. It shows that the Court has to decide the preliminary question of admissibility on a consideration of the evidence and surrounding circumstances.⁶ The Court has to determine the sufficiency of the inducement, threat or promise as affording certain grounds, to see whether the ground would appear reasonable for the supposition mentioned in the section, and to judge whether the confession appears to have been caused in consequence of the inducement, threat or promise. A well-grounded conjecture reasonably based on the circumstances in the evidence is sufficient to exclude the confession. The mentality of the accused rather than that of the person in authority has to be taken into account by the Court in determining the effect of the inducement, threat or promise. It has to consider not merely the actual words, but also the words, coupled with the acts or conduct of such person, which might be construed by the accused, in his position, as amounting to an inducement, threat or promise. A perfectly innocent expression, coupled with the acts and conduct and the surrounding circumstances, may amount to the same.⁷

7. 'Temporal nature.'—The inducement must be of a temporal kind, i.e., not spiritual or religious. Confessions obtained by spiritual exhortations are admissible in evidence. A merely moral exhortation to tell the truth is not objectionable.⁸

CASES.—Inducement.—A confession made by an accused on the faith of a promise made by the police-officer making the inquiry that he would get off he made a disclosure,⁹ or would get a pardon,¹⁰ was inadmissible in evidence. Simi-

¹ *Emperor v. Ganesh Chandra Golder*, (1922) 50 Cal. 127.

² *The Queen v. Croydon*, (1846) 2 Cox 67.

³ *Jas Bahadur Thapa v. King-Emperor*, (1929) 8 Ran. 52.

⁴ *Bulagi v. The Crown*, (1928) 9 Lah. 671.

⁵ *Santokhi Beldar v. King-Emperor*, (1932) 12 Pat. 241, F.B. *Taule v. King-Emperor*, (1929) 5 Luck. 91, seems to be of doubtful authority.

⁶ *Emperor v. Narayan*, (1907) 9 Bom. L. R. 789, 799, 32 Bom. 111, F.B.

⁷ *Emperor v. Panchkowi Dutt*, (1924) 52 Cal. 67; *Queen-Empress v. Baswanta*,

(1900) 2 Bom. L. R. 761, 765, 25 Bom. 168.

⁸ *King-Emperor v. Akhileshwari Prasad*, (1925) 4 Pat. 646.

⁹ *Musammal Nurai v. The Empress*, (1881) P. R. No. 8 of 1882 (Cr.).

¹⁰ *Emperor v. Misri*, (1909) 31 All. 592, F.B.; *Emperor v. Khatal*, (1923) 45 All. 300; *Muhammad Shaffi v. Queen-Empress*, (1899) P. R. No. 1 of 1899 (Cr.); *Nga Po Kyaw v. Empress*, (1886) S. J. L. B. 396; *Emperor v. Cunna*, (1920) 22 Bom. L. R. 1247, in which there was a difference of opinion amongst the Judges as to the admissibility of evidence of the accused in virtue of s. 339 (2) of the Criminal Procedure Code.

larly, a confession made before a Magistrate who had told the accused that, if he made a full confession, he would take that fact into consideration in awarding punishment, was inadmissible.¹ Where the accused, in making a confession before a Magistrate, admitted that he had been told to tell the truth by the Sahib who told him to tell the truth and he would be released, it was held that the confession was vitiated by inducement.²

No inducement.—Where a police-officer read over to the accused the statements which he had taken from others and then told him, "I know the whole thing now", and the accused thereupon made a statement in consequence of which he was arrested and his confession was subsequently recorded before a Magistrate, it was held that the confession recorded under those circumstances was free and voluntary and was perfectly admissible in evidence.³

Person in authority.—**Auditor.**—W, a travelling auditor in the service of the G. I. P. Railway Company, having discovered defalcations in the accounts of the accused, who was a booking-clerk of the company, went to him and told him that, "he had better pay the money than go to jail", and added that "it would be better for him to tell the truth", after which the accused was brought before the Traffic Manager in whose presence he signed a receipt for, and admitted having received a sum of Rs. 826-8-0. The accused was subsequently put on his trial for criminal breach of trust as a servant in respect of this and of other sums. It was held that the words used by W, the travelling auditor, constituted an inducement to the accused to confess, and that W was a person in authority, and that the receipt signed by the accused was, therefore, not admissible in evidence on his trial.⁴ Where a confession was made by the accused under an inducement given by a person sent by a Sub-Inspector, that the Sub-Inspector would treat them leniently if they confessed, it was held that this was an inducement proceeding from a person in authority and the confession was inadmissible.⁵

Panchayat.—Where an inducement to confess a crime proceeded from the member of a *panch*, the confession made in virtue of the inducement was held not bad; the member of the *panch* not being a person in authority.⁶ But the Calcutta and the Patna High Courts have held that a *panch* is a person in authority within the meaning of this section. A confession is inadmissible when, in answer to the enquiry of the accused, whether he would be saved from the consequences if he confessed, the *panchayat* assured him that he would be let off if he disclosed everything, and when the confession was made as the result of such assurance.⁷ Where the village *panch* told the accused that the truth had come out and that he had better say what he knew and the accused thereupon confessed his guilt, it was held that the confession was inadmissible in evidence.⁸

Superior officer.—Where the accused, a post-office clerk, under suspicion, fell at his department inspector's feet begging to be saved if he disclosed everything,

¹ *Queen-Empress v. Nga Paw Lon*, (1884) S. J. L. B. 289.

² *Emperor v. Dinanath Sundarji*, (1920) 45 Bom. 1086, 23 Bom. L. R. 338.

³ *King-Emp. v. Rango*, (1901) 3 Bom. L. R. 404.

⁴ *Reg. v. Navroji Dadabhai*, (1872) 9 B. H. C. 358; *Nga Pye v. King-Emperor*, (1904) 2 L. B. R. 316.

⁵ *Bulaqi v. The Crown*, (1928) 9 Lah. 671.

⁶ *Emperor v. Fernand*, (1902) 4 Bom. L. R. 785. A *mukhia* is not a person in authority: *Emperor v. Har Piari*, (1926) 49 All. 57.

⁷ *Emperor v. Ganesh Chandra Goldar*, (1922) 50 Cal. 127.

⁸ *Kunja Subudhi v. King-Emperor*, (1928) 8 Pat. 289.

and the inspector replied that he would try his utmost to save him if he told the truth; whereupon the accused said he would tell everything to the post-master, and the postal inspector said he would do all he could to get accused saved, it was held that such inducement was held out by the postal investigating officer, who was a person in authority, as had the effect of inducing the accused to make a confession of his guilt.¹

Doctor.—The accused made a confession of his guilt to the medical officer of his regiment, who told the accused, when he was under his treatment in the hospital, that it would be better for him to tell the truth as to how he came about certain wounds. It was held that the medical officer was not a person in authority in respect of any proceedings which might be contemplated or taken against the accused who made the confession to him; and that all that he represented to the accused was that, on medical grounds, it would be for the accused's benefit if he told the truth as to how he came by the wounds.²

Captain.—The captain of a vessel said to one of his sailors suspected of having stolen a watch—"That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to New-castle—you are a damned villain, and the gallows is painted in your face." It was held that the confession made by the sailor after this threat was not receivable in evidence on his trial for the felony.³

Spiritual exhortation.—An accused charged with murder, being a few days short of fourteen, was told by a man who was present when he was taken up, but not a constable, "Now kneel you down, I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty." The accused in consequence made certain statements. It was held that the statements were admissible in evidence.⁴

25. No confession¹ made to a police-officer² shall be proved as against³ a person accused of any offence.

COMMENT.—Principle.—Under this section, a confession made to a police-officer is inadmissible in evidence except so far as is provided by s. 27. The principle upon which the rejection of confession made by an accused to a police-officer or while in the custody of such officer (s. 26) is founded is that a confession thus made or obtained is untrustworthy. The broad ground for not admitting confessions made to a police-officer is to avoid the danger of admitting false confessions.⁵

Section 162 of the Criminal Procedure Code enacts that no statement made by any person to a police-officer in the course of an investigation shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence.

Object.—The object of this section and s. 26 is to prevent the practice of torture by the police for the purpose of extracting confessions from accused persons. Under this section no confession made to a police-officer is admissible against the accused. Any incriminating statement made by an accused to a police-officer

¹ *Bhagabaticharan Patra v. Emperor*, 570. (1933) 60 Cal. 719.

² *Emperor v. Mahamadbuksh*, (1906) 452.

³ *Bom. L. R.* 507.

⁴ *Rex v. Parratt*, (1831) 4 C. & P.

⁵ *Wild's Case*, (1835) 1 Moody C. C.

452.

⁵ *Queen-Empress v. Babu Lal*, (1884) 6 All. 509, 532, F.B.

is inadmissible in evidence.¹ Under the next section a confession made to a private person by a person in custody of the police is inadmissible in evidence.

Scope.—This section covers a confession made to a police-officer before any investigation has begun or otherwise not in the course of an investigation.² Section 26 does not qualify the plain meaning of this section.³ The prohibition contained in this section is of a general nature. It forbids the proof at a trial of a criminal offence of any confession of any offence made by the accused to the police-officer. Therefore, the confession made by the accused to the police of an offence of culpable homicide not amounting to murder is not admissible in evidence in his trial for murder upon the same facts.⁴

A confession made to the police in the course of investigating crime A, although it relates to another crime B, is equally inadmissible. The whole spirit of this section is to exclude confessions to the police and, the moment a statement is found to amount to a confession, it does not matter of what crime it is said to be a confession.⁵

English law.—Sections 25, 26 and 27 differ widely from the law of England. In England a confession to a police-officer is admissible in evidence in the absence of threat or promise.

1. 'Confession.'—A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession.⁶

This section does not exclude all statements by an accused to the police but only confessions. There is a distinction between mere admissions and confessions which are statements either directly admitting guilt or suggesting the inference of guilt of the crime charged. The general rule in the section is further subject to that which admits statements leading to discovery whether they amount to confessions or not. Exculpatory statements by an accused to the police as to what, according to his case, actually happened on the occasion of the commission of the offence and put forward by way of defence, are admissible as admissions, notwithstanding that they are shown by other evidence to be untruthful. A useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution relies on the statements as true they may, and probably in many cases will, be found to amount to confessions. If they are relied on not because of their truth but of their falsity and as a circumstance thereby tending to prove the guilt of the accused, they are admissible as admissions. Where the accused told the police that certain other persons

¹ *Imperatrix v. Pandharinath*, (1881) 6 Bom. 34; *Queen-Empress v. Nana*, (1889) 14 Bom. 260, F.B.; *Queen-Empress v. Mathews*, (1884) 10 Cal. 1022; *Queen-Empress v. Javecharam*, (1894) 19 Bom. 363; *Farid v. King-Emperor*, (1906) P. R. No. 16 of 1906 (Cr.); *Queen-Empress v. Nga Thei*, (1900) 1 U. B. R. (1897-1901) 156.

² *Pakala Narayana Swami v. The King-Emperor*, (1939) 66 I. A. 66, 41

Bom. L. R. 428, 18 Pat. 234, [1941] Ran. 789n.

³ *Queen v. Hurribole Chunder Ghose*, (1876) 1 Cal. 207.

⁴ *Ali Gohar v. Crown*, [1941] Kar. 292.

⁵ *Seshapani*, In re, [1937] Mad. 358, 361.

⁶ *Pakala Narayana Swami v. The King-Emperor*, sup., p. 81.

had killed the deceased, described the occurrence, and stated that he was seized by them but escaped and concealed himself in a paddy field, that he went to the houses of several people for assistance against the murderers but was turned away as a mad man, and that he then went and slept at the house of another person, it was held that the statements were admissible in evidence.¹

2. 'Police-officer.'—This term should not be read in a strict technical sense but according to its more comprehensive and popular meaning.² It applies to every police-officer and is not restricted to officers in a regular police force. Thus a Chowkidar,³ a Police Patel,⁴ a village headman,⁵ an excise peon,⁶ and an excise officer, according to the Calcutta⁷ and the Bombay⁸ High Courts, are police-officers; but a jailor,⁹ an excise officer, according to the Rangoon¹⁰ and the Patna¹¹ High Courts, and an Assistant Commissioner acting merely as an executive officer,¹² are not. The Madras High Court has held that as this section refers only to a police-officer, its provisions should not be extended to other classes of officers merely on the ground of similarity of functions. Thus the Assistant Inspector of Customs, though invested with certain powers of search, arrest and seizure, cannot be deemed to be a police-officer for the purpose of this section.¹³

The words 'police-officer' include the police-officers of Indian States.¹⁴

A confession made to a police-officer in the presence and hearing of a private person is not to be considered as made to the latter, and is therefore inadmissible.¹⁵

3. 'As against.'—This section does not preclude one accused person from proving a confession made to a police-officer by another accused person tried jointly with him. Such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.¹⁶ A confession might be inadmissible under this section, yet for other purposes it would be admissible as an admission under s. 18 against the person who made it in his character of one setting up an interest in property, the object of litigation or judicial enquiry and disposal.¹⁷

CASES.—P, accused of the murder of a girl, gave to a police-officer a knife saying it was the weapon with which he committed the murder. He also said that

¹ *Emperor v. Kangal Mali*, (1905) 41 Cal. 601.

² *Queen v. Hurribole Chunder Ghose*, (1876) 1 Cal. 207, 215; *Maung Wun v. Queen-Empress*, (1898) P. J. L. B. 22.

³ *Queen-Empress v. Salemuddin Sheikh*, (1899) 26 Cal. 569; *King-Emperor v. Pancham*, (1893) 8 Luck. 410; *Emperor v. Deokinandan*, [1937] All. 85, F.B. In the Punjab a village chaukidar is held to be not a 'police-officer': *Khuda Bakhsh v. The Crown*, (1917) P. R. No. 42 of 1917 (Cr.).

⁴ *Empress v. Rama Birapa*, (1878) 3 Bom. 12; *Queen-Empress v. Bhima*, (1892) 17 Bom. 485.

⁵ *Lu Bein v. Queen-Empress*, (1889) S. J. L. B. 479; *Po Sin v. King-Emperor*, (1907) 3 L. B. R. 283.

⁶ *Emperor v. Dinshaw Driver*, (1928) 31 Bom. L. R. 49, 54 Bom. 35.

⁷ *Ibrahim Ahmad v. King-Emperor*, (1931) 58 Cal. 1260, dissenting from *Ah Foong v. Emperor*, (1918) 46 Cal.

411; *Ameen Sharif v. Emperor*, (1934) 61 Cal. 607, F.B.

⁸ *Emperor v. Nanoo*, (1926) 28 Bom. L. R. 1196, 51 Bom. 78, F.B., overruling *Pereira v. Emperor*, (1926) 28 Bom. L. R. 674.

⁹ *Queen-Empress v. Bhima*, (1892) 17 Bom. 485; *Queen-Empress v. Tatyia*, (1895) 20 Bom. 775.

¹⁰ *Maung San Myin v. King-Emperor*, (1929) 7 Ran. 771.

¹¹ *Radha Kishun Marwari v. King-Emperor*, (1932) 12 Pat. 46, F.B.

¹² *Bidullah v. Queen-Empress*, (1898) P. R. No. 10 of 1895 (Cr.).

¹³ *Mayalazhanam*, [1947] Mad. 788.

¹⁴ *Queen-Empress v. Nagla Kala*, (1896) 22 Bom. 235.

¹⁵ *Empress of India v. Pancham*, (1882) 4 All. 198, 201.

¹⁶ *Imperatrix v. Pitamber Jina*, (1877) 2 Bom. 61.

¹⁷ *Queen-Empress v. Tribhovan Manekchand*, (1884) 9 Bom. 131.

he threw down the girl's anklets at the scene of the murder and would point them out. On the following day he accompanied the police-officer to the place where the girl's body was found, and pointed out the anklets. It was held that such statements, being confessions made to a police-officer, whereby no fact was discovered, could not be proved against P.¹ The accused, on his arrest, made a statement in the nature of a confession, which was reduced into writing by one of the Inspectors in whose custody he was, and subsequently signed and acknowledged by him in the presence of the Deputy Commissioner of Police at the police office, the Deputy Commissioner receiving and attesting the statement in his capacity as Magistrate and Justice of the Peace. It was held that the confession was not admissible in evidence.²

An accused was charged with the offence of belonging to a gang of persons associated for the purpose of habitually committing dacoity. During the police enquiry he had made a statement to an Inspector of Police that a bundle of ammunition produced by him was given to him by two other accused who were charged with him as being members of the gang. It was held that though that statement was self-exculpatory it was inadmissible in evidence under this section as it amounted to an admission of an incriminating circumstance.³

26. No confession made by any person whilst he is in the custody¹ of a police-officer,² unless it be made in the immediate presence of a Magistrate,³ shall be proved as against such person.

Confession by accused while in custody of police not to be proved against him.

Explanation.—In this section “Magistrate” does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.

COMMENT.—Principle.—Under this section no confession made by a person in custody to any person other than a police-officer, shall be admissible, unless made in the immediate presence of a Magistrate. Section 25 excludes confessions to a police-officer under any circumstances. This section excludes confessions to anyone else, while the person making it is in a position to be influenced by a police-officer. The presence of the Magistrate secures the free and voluntary nature of the confession and the confessing person has an opportunity of making a statement uncontrolled by any fear of the police.⁴ Thus, this section is a further extension of the principle laid down in s. 25. Section 25 applies to all confessions made to police-officers, this section, to confessions made to persons other than police-officers but made while in police custody. A confession made to a police-officer will be inadmissible in evidence under s. 25 even if it is made in the presence of a Magistrate.

A statement made to a police-officer by an accused person while in the custody of the police, although intended to be made in self-exculpation and not as a confession, may be nevertheless an admission of a criminating circumstance, and, if so, under ss. 25 and 26, it cannot be proved against the accused.⁵ If it is an admission of a criminating circumstance it cannot be used in evidence either under s. 25 or

¹ *Empress of India v. Pancham*, (1882) 4 All. 198; *Emperor v. Hira Gobar*, (1919) 21 Bom. L. R. 724.

² *Queen v. Hurribole Chander Ghose*, (1876) 1 Cal. 207.

³ *Emperor v. Haji Sher Mahomed*, (1921) 46 Bom. 961, 25 Bom. L. R. 214.

⁴ *Hiran Miya*, (1877) 1 C. L. R. 21.

⁵ *Imperatrix v. Pandharinath*, (1881) 6 Bom. 34.

this section.³ But if it does not amount directly or indirectly to an admission of any incriminating circumstance it is admissible. Where, therefore, the accused was found carrying away a box at night, and when asked by a policeman about the ownership of the box, he stated that it belonged to him, it was held that the statement was admissible against him in a trial of theft regarding the box.³

1. 'Custody.'—The mere temporary absence of a policeman from the room in which the confession is recorded does not terminate his custody of the accused, if he has taken effective steps to prevent his escape whether by locking the door of the room or by waiting outside,⁴ or by leaving him in the custody of another person.⁵ Where a village policeman who had arrested the accused left him in charge of certain villagers and went to see the scene of occurrence and during that interval the accused confessed his guilt to those villagers, it was held that notwithstanding the temporary absence of the policeman, the accused being still under police custody, the extra-judicial confession made before the villagers was not admissible in evidence.⁶ The evidence of a police-officer and of witnesses as to the pointing out of the various places by the accused is really evidence of the confession of his guilt made by the accused while the latter is in the custody of the police-officer and is, therefore, a statement inadmissible under s. 25 and this section.⁷ As soon as an accused or a suspected person comes into the hands of a police-officer, he is, in the absence of a clear and unmistakable evidence to the contrary, no longer at liberty, and is, therefore, in custody within the meaning of this section and s. 27.⁸

2. 'Police-officer.'—This term includes police-officers of Indian States.⁹ A jailor is not a police officer, and a confession made to him may be given in evidence.¹⁰

3. 'Immediate presence of a Magistrate.'—The word 'Magistrate' includes Magistrates of Indian States.¹¹ A confession made to a Magistrate while in the custody of the police is admissible.¹² A confession made while in the custody of the police to an officer who is not a Magistrate, e.g., a Portuguese Administrator,¹³ is not admissible in evidence. Confession made by the accused in police custody to a Magistrate in England or in a foreign country, e.g., (French India), is admissible.¹⁴ A statement made on oath before the Coroner is admissible in evidence.¹⁵

² *Queen-Empress v. Javecharam*, (1894) 19 Bom. 363; *Queen-Empress v. Jai Singh*, (1900) P. R. No. 12 of 1900 (Cr.); *Hakiman v. King-Emperor*, (1905) P. R. No. 20 of 1905 (Cr.); *Farid v. King-Emperor*, (1906) P. R. No. 16 of 1906 (Cr.).

³ *Emperor v. Mahomed*, (1903) 5 Bom. L. R. 312, distinguishing *Imperia v. Pandharinath*, (1881) 6 Bom. 34.

⁴ *Queen-Empress v. Lakshmya*, (1896) Unrep. Cr. C. 855.

⁵ *King-Emperor v. Musammatt Jagia*, (1938) 17 Pat. 369.

⁶ *King-Emperor v. Pancham*, (1933) 8 Luck. 410.

⁷ *Turab v. King-Emperor*, (1934) 10 Luck. 281.

⁸ *Maung Lay v. King-Emperor*, (1923) 1 Ran. 609; *King-Emperor v. Pancham*, (1933) 8 Luck. 410.

⁹ *Queen-Empress v. Nagla Kala*, (1896) 22 Bom. 235.

¹⁰ *Queen-Empress v. Bhima*, (1892) 17

Bom. 485; *Queen-Empress v. Taty*, (1895) 20 Bom. 795.

¹¹ *Queen-Empress v. Nagla Kala*, sup.; *Queen-Empress v. Sundar Singh*, (1890) 12 All. 595; *Govinda v. King-Emperor*, (1920) 17 N. L. R. 118. The word 'Magistrate' in s. 80, *infra*, does not include a Magistrate of an Indian State; *Emperor v. Dhanka Amra*, (1914) 16 Bom. L. R. 261.

¹² *Emperor v. Sidheswar Nath*, (1933) 56 All. 730.

¹³ *Emperor v. Mhabli*, (1924) 26 Bom. L. R. 706.

¹⁴ *Panchanathan Pillai, In re*, (1929) 52 Mad. 529.

¹⁵ *Emperor v. Rammath Mahabir*, (1925) 28 Bom. L. R. 111, 50 Bom. 111; *Emperor v. Mahomed Hasan*, (1927) 30 Bom. L. R. 86. See s. 20 of the Coroners Act (IV of 1871) which says that a Coroner shall be deemed to be a Magistrate.

CASES.—Custody.—An English woman under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed, to the principal town of the district. A European friend drove with her in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend with reference to the alleged offence. At the trial it was proposed to ask what the accused had said, on the ground that she was not then in custody, and that this section did not apply. It was held that, notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question could not be allowed.¹ While the accused was in the lock-up of the Magistrate under trial, he was sent up by the Magistrate to a hospital for treatment. He was taken from the lock-up to the dispensary by two policemen, who waited outside on the verandah of the hospital. During his examination inside the dispensary by the doctor, the accused made a confession of his guilt to another patient who happened to be there within the hearing of the doctor. It was held that the confession was inadmissible, because the accused, who was in police custody up to his arrival at the hospital, remained in that custody even though the policemen were standing outside on the verandah.²

27. Provided that, when any fact is deposited to as discovered in consequence of information¹ received from a person accused of any offence,² in the custody of a police officer,³ so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

How much of information received from accused may be proved.

COMMENT.—Principle.—This section is founded on the principle that if the confession of the accused is supported by the discovery of a fact it may be presumed to be true and not to have been extracted. It comes into operation only

- (1) if and when certain facts are deposited to as discovered in consequence of information received from an accused person in police custody; and
- (2) if the information relates distinctly to the fact discovered.

The broad ground for not admitting confessions made under inducement or to a police officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided for by this section when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.³

It is immaterial whether the statement is sufficient to enable the police to make the discovery by themselves, or is only of such a nature as to require further assistance of the accused to enable them to discover the fact.⁴

Object.—The object of this section is to admit evidence which is relevant to the matter under inquiry, namely, the guilt of the accused, and not to admit evidence which is not relevant to that matter. The discovery of a material object is of no relevancy to the question whether the accused is guilty of the offence charged against him unless it is connected with the offence. It is, therefore, the connection of the

¹ *Empress v. Lester*, (1895) 20 Bom. Lah. 671, 675.

² *Emperor v. Mallangowda*, (1917) 19 Bom. L. R. 683, 42 Bom. 1. ⁴ *The Legal Remembrancer v. Chema Nashya*, (1897) 25 Cal. 413; *Queen-Empress v. Nana*, (1889) 14 Bom. 260, F.B.

³ *Bulagi v. The Crown*, (1928) 9 L. E.—5.

thing discovered which renders its discovery a relevant fact. The connection between the offence and the thing discovered may be established by evidence other than the statement leading to the discovery but that does not exclude proof of the connection by the statement itself.¹

Scope.—This section serves as a proviso to ss. 25 and 26.² The Calcutta and the Nagpur High Courts have further held that this section also qualifies s. 24³ and cuts down its operation.⁴ The Patna High Court has held that this section controls ss. 24, 25 and 26.⁵ A confession to which this section applies is admissible in evidence even though it was obtained under circumstances which make it inadmissible under s. 24.⁶

Unless a connection is shown between the articles discovered and the crime, such as blood stains thereon if the offence is one of murder, a statement leading to the discovery of the articles is not admissible under this section. Mere proof that the ornaments discovered had been on the person of the deceased before her death would not necessarily mean that they were connected with the crime of murder. If, however, bloodstains are detected on the ornaments, presence of blood may sufficiently indicate their connection with the murder and so any statement made leading to their discovery would become admissible under this section.⁷

The section refers to information whether received by a police-officer or by other person, there being nothing in the language of the section to justify any distinction in respect of the person to whom the information is to be given.⁸

The Burma Courts have held that this section is not a proviso to s. 24; but the evidence of the fact that the accused pointed out certain property is admissible. No part of a confession caused in the manner described in s. 24 can be relevant except in the circumstances provided for by s. 28. Statements that are irrelevant under one section may be relevant under other sections. The word "irrelevant" is advisedly retained in s. 24 and is contrasted with "shall not be proved" in the two subsequent sections.⁹ The discovery of a fact in consequence of information given by an accused person to the police does not render a subsequent confession to a police-officer admissible in evidence.¹⁰

Section 162 of the Criminal Procedure Code does not affect this section and therefore information leading to the discovery of a fact made to the police and admissible under this section is not rendered inadmissible under it. There was a divergence of judicial opinion on this point and it has been set at rest by the

¹ *Puransingh v. King-Emperor*, (1946) 25 Pat. 279.

² *Queen-Empress v. Babu Lal*, (1884) 6 All. 509, F.B.; *Ganu Chandra v. Emperor*, (1931) 56 Bom. 172, 34 Bom. L. R. 308; *Naresh Chandra Das v. Emperor*, [1942] 1 Cal. 436; *Pakala Narayana Swami v. Emperor*, (1939) 66 I. A. 66, 80, 41 Bom. L. R. 428, 18 Pat. 234.

³ *Amitruddin Ahmed v. Emperor*, (1917) 45 Cal. 557.

⁴ *Durlav Namasudra v. Emperor*, (1931) 59 Cal. 1040; *Neharu v. Emperor*, [1937] Nag. 268; *Mst. Jamania v. King-Emperor*, [1936] Nag. 78. See, contra, *Superintendent and Remembran-*

cer of Legal Affairs, Bengal v. Bhaju Majhi, (1929) 57 Cal. 1062.

⁵ *Mathura v. King-Emperor*, (1945) 24 Pat. 671.

⁶ *Neharu v. Emperor*, sup.; *Bulagi v. The Crown*, (1928) 9 Lah. 671; *Mathura v. King-Emperor*, sup.

⁷ *Ramprasad v. King-Emperor*, [1949] Nag. 200.

⁸ *Queen-Empress v. Babu Lal*, (1884) 6 All. 509, 511, F.B.

⁹ *King-Emperor v. Nga Po Min*, (1903) 2 L. B. R. 168; *Nga San Ya v. King-Emperor*, (1909) 1 U. B. R. (1907-1909) (Evi.) 3.

¹⁰ *Kha Hlaw v. King-Emperor*, (1907) 4 L. B. R. 116.

Legislature by adding the words "or to affect the provisions of section 27 of that Act" [Evidence Act] to s. 162.

The Privy Council has held that this section, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police-officer must be deposed to, and so much of the information as relates to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, weapon or ornaments, said to be connected with the crime, of which the informant is accused. The proviso to s. 26, added by this section, should not be held to nullify the substance of the section.

It is fallacious to treat the "fact discovered" within this section as equivalent to the object produced: the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to the past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into this section something which is not there, and admitting in evidence a confession barred by s. 26. Except in cases in which the possession or concealment of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.¹

1. 'When any fact is deposed to as discovered in consequence of information.'—The 'fact' must be a 'relevant fact' (s. 5). The fact said to have been discovered in consequence of information received from a person accused of an offence must be of a kind which such information really helps to bring to light and which it would be difficult to find out otherwise before it can be treated as of any substantial probative value.² The fact must be the consequence, and the information the cause of its discovery. The information and the fact should be connected with each other as cause and effect. If any portion of the information does not satisfy this test, it should be excluded.³ Where a suspect in the custody of

¹ *Kottaya v. Emperor*, (1946) 49 Bom. L. R. 508, P.C.

² *Sukhan v. The Crown*, (1929) 10 Lah. 283, 293, F.B.; *King-Emperor v. Ramanujam*, (1934) 58 Mad. 642, F.B.

³ *Nga Shwe Tat v. Queen-Empress*, (1897) 1 U. B. R. (1897-1901) 152.

police makes a statement that he committed murder and removed ornaments which he produces later, the first part of the statement does not fall under this section because it is not a statement required to lead up to the production of the property.¹

Statements by an accused to police officers pointing out the places where the offence was committed by others or where he concealed himself thereafter, and the houses to which he went for assistance, whether regarded as information leading to discovery, or as statements made by him as part of his defence, are admissible in evidence as admissions.² A police-officer can depose that the accused went to him and stated that his wife was lying on the bed wounded, that the sword was also on the bed and the padlock on the window sill, but the statement that he had severely hacked his wife was not admissible.³

2. 'Received from a person accused of any offence.'—The statement must be of a person who was then an accused. If at the time when the confession was made, the person making it was not an accused person, the statement would not be admissible. A husband who had fatally assaulted his wife immediately went to the police-station and stated, "I went into the west-facing room and finding my wife sitting, wounded her and she became senseless". In consequence of this information the Sub-Inspector went to the house of the informant and found the corpse of the woman in that room. It was held that as the informant had not, up to the time of making the statement, been under arrest, the statement was not admissible.⁴

3. 'In the custody of a police-officer'.—The section does not apply to information given to the police by an accused person who was not in custody at the time it was given.⁵ The submission of a person to the custody of a police-officer within the terms of s. 46(1) of the Criminal Procedure Code is 'custody' within the meaning of this section.⁶

As soon as an accused or suspected person comes into the hands of a police-officer, he is, in the absence of clear evidence to the contrary, no longer at liberty, and is therefore in custody within the meaning of ss. 26 and 27.⁷ In the case of mere suspects, who have not been formally charged with any offence or arrested under any section of the Criminal Procedure Code, their presence with the police-officer under some restraint amounts to 'custody'.⁸ 'Custody' connotes some idea of restraint on the movements of a person whether by word or action and does not necessarily mean custody after formal restraint.⁹

4. 'Such information as relates distinctly to the fact discovered.'—Divergent views prevail as to how much of statements made by accused persons in the custody of the police in consequence of which facts are discovered can be proved.

The Bombay High Court has observed: "It is not all statements connected with the production or finding of property which are admissible; those only which

¹ *Emperor v. Bhikha Gober*, (1943) 45 Bom. L. R. 884.

² *Emperor v. Kangal Mali*, (1905) 41 Cal. 601; *Lalji Dusadh v. King-Emperor*, (1927) 6 Pat. 747; *Sonaram Mahlon v. King-Emperor*, (1930) 10 Pat. 153.

³ *Legal Remembrancer v. Lalit Mohan Singh Roy*, (1921) 49 Cal. 167.

⁴ *Deonandan Dusadh v. King-Emperor*, (1928) 7 Pat. 411.

⁵ *Kha Hlaw v. King-Emperor*,

(1907) 4 L. B. R. 116; *King-Emperor v. Nga Aung Ba*, (1916) 2 U. B. R. (1914-1916) 114.

⁶ *Legal Remembrancer v. Lalit Mohan Singh Roy*, sup.

⁷ *Mussammatt Aishan Bibi v. The Crown*, (1933) 15 Lah. 310.

⁸ *Allah Ditta v. The Crown*, (1936) 18 Lah. 106.

⁹ *Hakam v. The Crown*, [1940] Lah. 242.

lead immediately to the discovery of property, and so far as they do lead to such discovery are properly admissible. Whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statement made must have been such that that statement constituted the information through which the discovery was made in order to render the statement admissible. Other statements connected with the one thus made evidence, and so mediately, but not necessarily or directly, connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police. For instance, a man says: 'You will find a stick at such and such a place. I killed Rama with it.' A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If, instead of 'you will find', the prisoner has said, 'I placed a sword or knife in such a spot', when it was found, that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, much less caused, the discovery, is not admissible."¹ A statement to the police by the accused in custody saying, "I put a bomb in R's office; I will show it to you", which puts the police in motion and results in finding the bomb at the place indicated, is admissible in evidence under this section.²

The accused was charged, under s. 411 of the Penal Code, with dishonestly receiving stolen property. In the course of the police investigation the accused was asked by the police where the property was. He replied that he had kept it, and would show it. He said he had buried the property in the fields. He then took the police to the spot where the property was concealed, and with his own hands disinterred the earthen pot in which the property was kept. He made a second statement when pointing out the spot to the effect that he had buried the property there. It was held that the above statements were clearly in the nature of a confession, as they suggested the inference that the accused committed the crime, and even if not intended by the accused as a confession of guilt, they were an admission of a criminalizing circumstance and would form a very important part of the evidence against the accused, as showing that he had not come by the property honestly, and, therefore, properly within the rule of exclusion in regard to confessions made by a person in the custody of the police; but the accused's statement, that he had buried the property in the fields, was admissible in evidence under this section, as it set the police in motion and led to the discovery of the property.³

Where the accused gives information to the police in a form which divides such information into several parts, the part admissible under this section can be easily separated. But, where the accused gives his information in the form of a compound statement, the Judge must, before he records it as evidence or leaves it to the jury, divide the sentence into what are really its component parts and only

¹ *Reg. v. Jora Hasji*, (1874) 11 B. H. C. 242, 244, 245; *Queen-Empress v. Nana*, (1889) 14 Bom. 260, F.B.; *Emperor v. Shivputraya*, (1930) 32 Bom. L. R. 574.

² *Emperor v. Namdeo Kaikadi*, (1944) 46 Bom. L. R. 546.

³ *Queen-Empress v. Nana*, (1889) 14 Bom. 260, F.B.

admit that part which has led to the discovery of the particular fact. Where the accused states to the police, "I will produce the share which I received in such and such a dacoity," the statement is divisible into the following parts: (1) an admission that there was a dacoity, (2) an admission that the accused took part in it, (3) an admission that he got part of the property, and (4) a statement as to where the property is. The first three parts are not admissible in evidence, having regard to s. 25, but the fourth part is admissible under this section.¹ Where the accused stated to the police, that the throat of the deceased was cut with a knife, and the knife was at a particular spot in the kitchen, and the police found the knife at the place indicated, it was held that the first part of the statement, which was the incriminating part, and which did not directly lead to the discovery of the knife, should be excluded under this section but the second part of the statement should be admitted.²

During the police investigation into a case of dacoity, the accused said in the presence of the Sub-Inspector of Police and panchas: "About three months ago I had gone along with some others and after breaking open the Alnawar Bank had stolen the amount therefrom and I will produce the amount that is with me now at my house at Mugatkhan Hubli of the Alnawar Bank dacoity." After saying so, he took the police and the panchas to his house and produced Rs. 40 in currency notes. A question having arisen, how much of the above statement was admissible in evidence at the trial of the accused for dacoity, it was held that the only portion of the statement that was admissible in evidence under this section was "I will produce the amount."³

The Calcutta High Court has also held that this section is not intended to let in a confession generally, but only such particular part of it as set the person, to whom it was made, in motion, and led to his ascertaining the fact or facts of which he gives evidence.⁴ When statements made by an accused, whilst in police custody, consist of severable parts, some of which constitute a general confession of guilt, some are imputations of guilt on the accomplices, some lead to the discovery, of incriminating articles and some constitute statements made after the discovery such statements, in their entirety, are not admissible under this section.⁵ The Lahore,⁶ the Patna,⁷ and the Nagpur⁸ High Courts have taken the same view.

The Allahabad High Court has held that so much of the information given by the accused to the police-officer, whether amounting to a confession or not, as related distinctly to the facts thereby discovered, might be proved. The accused gave information to the police to the effect that they had stolen a cow and a calf and sold them to a particular person at a particular place. As a result of this information the cow and calf were discovered. It was held that only the statement that the accused had sold the cow and calf to a certain person could be proved under this section but not the statement that the accused had stolen them.⁹ The digging

¹ *Emperor v. Ganu Chandra*, (1931) 34 Bom. L. R. 303, 56 Bom. 172.

² *Emperor v. Salve*, (1933) 36 Bom. L. R. 384.

³ *Emperor v. Mareppa Ningappa*, (1948) 48 Bom. L. R. 542.

⁴ *Adu Shikdar v. Queen-Empress*, (1885) 11 Cal. 635; *Amiruddin Ahmed v. Emperor*, (1917) 45 Cal. 557; *Superintendent and Remembrancer of Legal Affairs, Bengal v. Bhaju Majhi*, (1929) 57 Cal. 1062; *Naresh Chandra Das*

v. Emperor, [1942] 1 Cal. 436.

⁵ *Satish Chandra Seal v. Emperor*, [1944] 2 Cal. 76.

⁶ *Sulthan v. The Crown*, (1929) 10 Lah. 283, F.B.

⁷ *Lalji Dusadh v. King-Emperor*, (1927) 6 Pat. 747; *Sonaram Mahlon v. King-Emperor*, (1930) 10 Pat. 153.

⁸ *Bharosa v. Crown*, [1940] Nag. 679.

⁹ *Queen-Empress v. Babu Lal*, (1884) 6 All. 509, F.B.; *B. B. Singh v. King-Emperor*, (1944) 21 Luck. 56.

out and handing over to the police by the accused person, without saying anything of certain articles from particular spots to which he took the police and witnesses does not amount to a "statement", and, therefore, is not inadmissible in evidence but is an "act" or "conduct", which is admissible in evidence under s. 8.¹

The Madras High Court has put a wider construction and held that the whole of the statement which leads to the discovery of a stolen article is admissible and it should not be cut up so as to confine it only to the actual words which the accused may use to express the fact that he had hidden the properties.² If it is the accused's statement that connects the fact discovered with the offence and makes it relevant, then, even though the statement amounts to a confession of the offence, it must be admitted because it is that that had led directly to the discovery of the fact.³

The Chief Court of Oudh at Lucknow has held that this section must be construed strictly and only so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered can be proved under it. The section is not intended to let in a confession generally.⁴

Joint statement.—Where both the accused persons made a joint statement to the police, in consequence of which the incriminating material object was discovered, but there was no evidence to show which of the particular accused made the crucial statement leading to the discovery, it was held that such a joint statement was not admissible, as a thing could not be discovered several times within the meaning of this section. Once an object is discovered in consequence of an information given by one of the accused, it does not remain to be discovered again in consequence of the information subsequently given by the other accused.⁵

CASES.—The accused were charged with the theft of some *jwari* (a kind of grain). During the police investigation they admitted that they had taken the grain and concealed it in a jar, which they forthwith produced. The identity of the *jwari* recovered with that stolen was not proved to the satisfaction of the trying Magistrate except by those admissions, and upon those admissions they were convicted of theft. It was held that, as the accused themselves produced the *jwari*, it was by their own act, and not from any information given by them, that the discovery took place and this section, therefore, did not apply; and though the fact of the production of the property might be proved, the accompanying confession made to the police was inadmissible in evidence.⁶

A was tried for the murder of B whose dead body was recovered from a well. B was wearing certain ornaments but they were not found on his body. A made a statement to the police.—"I had removed the ornaments, had pushed the boy into the well and had pledged them with X." The ornaments were recovered from X. It was held that the statement that the accused had pledged the ornaments with X was admissible, but that the rest of the incriminating statement could not be received in evidence.⁷ Where the accused in the custody of a police-officer said to him "I have buried a gun at such and such a place", it was held that not only the fact of the discovery of the gun but also the statement of the accused that he had buried the gun at that place was admissible in evidence.⁸

¹ *Emperor v. Nanua*, [1941] All. 280.

¹ Cut. 207.

² *Sogaimuthu Padayachi v. King-Emperor*, (1925) 50 Mad. 274.

⁶ *Queen-Empress v. Kamalia*, (1886) 10 Bom. 595.

³ *Athappa Goundan*, [1937] Mad. 695, F.B.

⁷ *Sukhan v. The Crown*, (1929) 10 Lah. 283, F.B.

⁴ *B. B. Singh v. King-Emperor*, (1944) 21 Luck. 56.

⁸ *Emperor v. Chokhey*, [1937] All. 710.

⁵ *Gurubarua Praja v. The King*, [1949]

The accused made a statement to a Sub-Inspector that he himself and one G killed S by gagging his mouth with cloth and throttling his neck with hands and also by putting a rope and pressing it, that that night they got two bottles of illicit arrack by paying Rs. 2 to G who got it from some other place, that a small quantity was left over in one bottle only, that they buried (1) the empty bottle (2) a rope and the cloth gag (the cloth which was used for gagging the mouth) in a dung-hill next to the cattle-shed in the same compound and the other bottle with some arrack in a heap of mud near a log of wood in a corner of another compound and that he would produce them. Subsequently the Sub-Inspector took the first accused together with the village munsiff to the dung-hill and the accused took out a rope, a cloth, and an empty bottle. The first accused then took the Sub-Inspector to the other compound and from near a log of wood dug up and produced another empty bottle. It was held that the whole of the statement was admissible in evidence and could be taken into consideration as against the second accused also.¹ Where in a case of murder, the first accused made a confession to the Circle Inspector which led to the discovery of certain jewels of the murdered woman, and also a blood-stained brick which, the first accused stated, the second accused had used to beat her with and in consequence of which she died, it was held that the statement of the first accused so far as it related to the discovery of the jewels was admissible under this section, and that it could not be taken into consideration as against the second accused under s. 30.²

Confession made after removal of impression caused by inducement, threat or promise, relevant.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

COMMENT.—Principle.—A confession is admissible after the impression caused by an inducement, threat, or promise, has been fully removed because it becomes free and voluntary. The impression caused by inducement, promise, or threat, should have been fully removed before the confession is admissible by lapse of time or by caution given by a person holding an authority superior to that of the person holding out the inducement, or by any intervening act. In determining whether an inducement has ceased to operate, the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it, will be taken into consideration by the Court. The proper place of this section would have been after s. 24 as it forms an exception to the provisions of that section.

CASE.—An accused made a confession to a *panchayat*, before arrest, on January 1, 1922, and he was thereupon kept in custody by the villagers till the arrival, next day, of the police, who formally arrested him, and sent him before a Magistrate, and the latter recorded his confession on the 4th idem. It was held that the improper influence employed by the *panchayat* continued to the time of the recording of the confession by the Magistrate, and that such confession was inadmissible.³

¹ *Athappa Goundan*, [1937] Mad. 1028.
695, F.B.

² *Abdul Basha Sahib*, [1940] Mad. (1922) 50 Cal. 127.

³ *Emperor v. Ganesh Chandra Goldar*,

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

COMMENT.—Principle.—A relevant confession does not become irrelevant because it was made—

- (1) under a promise of secrecy ;
- (2) in consequence of a deception practised on the accused ;
- (3) when the accused was drunk ;
- (4) in answer to questions which the accused need not have answered; and
- (5) in consequence of the accused not receiving a warning that he was not bound to make it and that it might be used against him.

This section applies to criminal cases and is to be read along with s. 24.

Statements made by a person in sleep are not receivable in evidence. But a statement made by an accused when he is drunk is receivable in evidence. If a police-officer gives an accused liquor in the hope of his saying something, and he makes any statement, that statement is not rendered inadmissible in evidence.¹

Section 164 of the Criminal Procedure Code provides the formalities to be undergone by Magistrates in recording confessions. It says among other things that the Magistrate shall explain to the person making the confession that he is not bound to make it. But this section says that a confession does not become irrelevant because the accused was not warned that he was not bound to make it. The Bombay High Court has held that the Criminal Procedure Code "is a special enactment applying only to certain statements made in the particular circumstances contemplated by s. 164. It cannot override the general provisions of this section except where these circumstances bring the section into operation."² Where questions are not put so as to elicit whether the confession is being made voluntarily, such confession is not only inadmissible under s. 164, Criminal Procedure Code, but it cannot be used under this section.³

CASES.—The accused made their confession of guilt to a company officer of their regiment, who stated to the accused that he had already obtained information from another person and promised secrecy if they told the truth. It was held that the company officer was not shown to be a person in authority in relation to any proceedings that were to be taken against him ; and that the alleged deception and inducement were covered by the provisions of this section.⁴

The evidence of a policeman who overheard an accused person's statement made in another room, and in ignorance of the policeman's vicinity and uninfluenced by it, is admissible.⁵

¹ *Rex v. Spilsbury*, (1835) 7 C. & P. 187. Nag. 416.

² *Emperor v. Ramnath Mahabir*, (1906) 8 Bom. L. R. 111, 114, 50 Bom. 111. *Emperor v. Mahamadbuksh*, (1906) 8 Bom. L. R. 507.

³ *Sardarmiya v. Crown*, [1937] (Cr.) 56. ⁴ *Queen v. Sageena*, (1867) 7 W. R. (Cr.) 56.

Statement made under promise of secrecy.—A was in custody on a charge of murder. B, a fellow-prisoner, said to him, "I wish you would tell me how you murdered the boy—pray split". A replied, "Will you be upon your oath not to mention what I tell you?" B went upon his oath that he would not tell. A then made a statement. It was held that this was not such an inducement to confess as would render the statement inadmissible.¹ A witness stated that an accused, charged with felony, asked the witness if he had better confess, and the witness replied that he had better not confess, but that the accused might say what he had to say to him, for it should go no further. The accused made a statement. It was held that it was receivable in evidence on the trial.²

Statement made under deception.—The accused asked the turnkey of the gaol in which he was locked to put a letter into the post for him, and after his promising to do so, the accused gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmitted it to the prosecutor. It was held that the letter was admissible in evidence against the accused notwithstanding the manner in which it was obtained.³

30. When more persons than one are being tried jointly¹ for the same offence,² and a confession made by one of such persons affecting himself and some other of such persons³ is proved,⁴ the Court may take into consideration such confession⁵ as against such other person as well as against the person who makes such confession.

Explanation.—"Offence," as used in this section, includes the abetment of, or attempt to commit, the offence.

ILLUSTRATIONS.

(a) A and B are jointly tried for the murder of C. It is proved that A said—"B and I murdered C". The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said—"A and I murdered C."

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

COMMENT.—Object.—The object of this section is that where an accused person unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction, which, to some extent, takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one.⁴ When a person admits his guilt to the fullest extent, and exposes himself to the pains and penalties provided therefor, there is a guarantee for his truth.⁵ The law does not require that the confessions should claim for its maker the leading part in the crime.⁶ But this is a very weak guarantee.

¹ *Rex v. Shaw*, (1834) 6 C. & P. 372.

² *Rex v. Thomas*, (1836) 7 C. & P. 345.

³ *Rex v. Derrington*, (1826) 2 C. & P. 418.

⁴ *Queen-Empress v. Jagrup*, (1885)

7 All. 646, 648.

⁵ *Empress v. Daji Narsu*, (1882) 6 Bom. 288, 291.

⁶ *King-Emperor v. Sadashibo Manjhi*, (1939) 18 Pat. 82.

For a confession may be true so far as its maker is concerned, but may be false and concocted through malice so far as it affects others.

Principle.—Where more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused, and not against the person alone who made it.¹ This section is an exception to the rule that the confession of one person is entirely inadmissible against another. The policy of the law in allowing a confession by one accused to be considered against another who is being jointly tried for the same offence, seems to rest on the recognition of the palpable fact that such a confession cannot fail to make an impression on the Judge's mind, which it was therefore better to control within limits than to ignore altogether.²

Under this section a confession by one person may be taken into consideration against another—

- (1) if both of them are tried jointly ;
- (2) if they are tried for the same offence ; and
- (3) if the confession is legally proved.

English law.—This section is contrary to the English law on the point. "A prisoner is not liable to be affected by the confessions of his accomplices. So strictly has this rule been enforced, that, where a person was indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft was held . . . to be no evidence of that fact as against the receiver. The decision, it seems, would be the same if both parties were indicted together, and the principal were to plead guilty."³ In a case the Madras High Court observed that this section "was a most unsatisfactory section and was a needless tampering with the wholesome rule of the English Law that a confession is only evidence against the person who makes it. The Courts of India in construing it have laid it down that a conviction of an accused, based solely on the confession of another accused, cannot stand and there must be independent evidence entirely outside, of the confession before it can be used."⁴

1. 'Tried jointly'.—There should be a joint trial of the accused. The joint trial should be legal. If from any cause the accused who made the confession cannot be legally tried with the accused against whom the confession is to be used, the Court should not attach any value to the confession.

Where the accused pleads guilty at the trial and is convicted and sentenced, he cannot be said to be jointly tried with his co-accused who pleads not guilty.⁵ Similarly, if one of the accused pleads guilty but he is not convicted or sentenced till the conclusion of the trial of his co-accused, he cannot be treated as being jointly tried with his co-accused.⁶

Sometimes evidence is taken in sessions cases even after the accused pleads 'guilty' and the case is decided upon the whole of the evidence including the accused's plea. The Madras High Court is of the opinion that when such a procedure is adopted the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration as against any

¹ *Empress v. Rama Birapa*, (1878) 3 Bom. 12.

² *Banna v. The Empress*, (1880) P. R. No. 29 of 1880 (Cr.); *Empress v. Daji Narsu*, (1882) 6 Bom. 288.

³ Taylor, 12th Edn., s. 904, p. 570.

⁴ *Ganganmull*, (1924) 20 L. W. 202, 205, 81 I. C. 817.

⁵ *Reg. v. Kalu Patil*, (1874) 11 B. H. C. 146; *Venkatasami v. The Queen*, (1883) 7 Mad. 102; *Queen-Empress v. Pirbhu*, (1895) 17 All. 524; *Queen-Empress v. Paltua*, (1900) 23 All. 53.

⁶ *Queen-Empress v. Pahuji*, (1894) 19 Bom. 195.

other person who is being jointly tried with him for the same offence.¹ A distinction has been drawn by the Madras High Court between a trial before a Sessions Court, and one before a Magistrate. In the Sessions Court the accused's plea of guilty is recorded under s. 271 at the outset of the trial. A prisoner who then pleads guilty and is convicted on the plea cannot be held to be tried jointly with the other co-accused against whom the case proceeds under s. 272. Where, therefore, all the accused were jointly tried before a Magistrate, and some of them confessed the crime and implicated their co-accused in a statement under s. 347, Criminal Procedure Code, and after the evidence for the prosecution was closed pleaded guilty under s. 255(1), it was held that their statement was admissible in evidence against the other co-accused.²

Where the accused person has pleaded guilty and the Court is prepared to convict on that plea, it is contrary to the spirit of the law to postpone the conviction so that the person who has pleaded guilty may technically be said to be tried jointly for the same offence with other co-accused and any statement in the nature of a confession that he may make use against them.³ Where a co-accused pleads guilty, and the Court has accepted the plea and directed his removal from the dock, and the trial proceeds against the remaining accused alone, a confession by the former is not admissible against the latter.⁴

In a full bench case the Nagpur High Court has laid down that the cases in which it was held that the confession of a co-accused who pleaded guilty could not be used under this section were those of sessions trials. The trial in Sessions Court begins only when the accused pleads not guilty and claims to be tried. Under s. 271, Criminal Procedure Code, if he pleads guilty the Court cannot try him but has forthwith to convict him. To defer his conviction only to enable the Court to use his confession under this section against his co-accused is wrong. But in warrant cases it is discretionary with the Magistrate to defer conviction of an accused who pleads guilty and use his confession against the other co-accused under this section.⁵

2. 'For the same offence'.—This expression means an offence coming under the same legal definition, i.e., under the same section of the law. When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculcates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice.⁶ 'Confession' in this section means confession of the very offence for which the accused are being tried.⁷ A and B were tried together under s. 239 of the Indian Penal Code on a charge of delivering to another counterfeit coins, knowing the same to be counterfeit at the time they became possessed of them. A confessed that he had got the coins from B and had passed them to several persons at his request. It was held that the confession of A was relevant against B.⁸

¹ *Queen-Empress v. Chinna Pavuchi*, (1899) 23 Mad. 151, dissenting from *Queen-Empress v. Lakshmayya Pandaram*, (1899) 22 Mad. 491.

² *Re Bati Reddi*, (1913) 38 Mad. 302; *Fakhruddin v. The Crown*, (1924) 6 Lah. 176.

³ *Emperor v. Kheoraj*, (1908) 30 All. 540.

⁴ *Emperor v. Keramat Sirdar*,

(1911) 38 Cal. 446.

⁵ *Amdumiyar v. Crown*, [1937] Nag. 315, 322, 323, F.B.

⁶ *Queen-Empress v. Nur Mahomed*, (1883) 8 Bom. 223.

⁷ *Periyaswami Moopan*, In re, (1930) 54 Mad. 75.

⁸ *Queen-Empress v. Nur Mahomed*, sup.

Where the Magistrate used against the accused, who was charged with assisting in concealing or disposing of stolen property, confessions made by two other persons who were tried for the theft of the property, it was held that those confessions were not admissible against the accused who was not charged with the same offence.¹ House-breaking and theft, and receiving the property stolen at that theft, are distinct offences, and the confession of one co-accused cannot be taken into consideration as against the other.²

3. 'Confession made by one of such persons affecting himself and some other of such persons'.—The confession must implicate the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the accused are being jointly tried.³ Thus the test is that the confessing accused must tar himself and the person or persons he implicates with one and the same brush.⁴ The Calcutta High Court has dissented from this view and held that it is not correct to say that a confession cannot be used against a co-accused if it does not implicate the maker substantially to the same extent as it implicates the person against whom it is to be used. It is admissible in evidence against a co-accused whether the confessing accused ascribes to himself a major or a minor part in the crime. Whether such a confession has any value or not is a different question.⁵

The Bombay High Court has held that the section is not limited to a case where the confessing accused directly implicates another accused as well as himself, but covers also a case where the confession indirectly affects a co-accused.⁶ The Madras High Court has differed on this point and has held that a confession which indirectly affects another accused not named in it on some circumstantial grounds cannot be used against him.⁷

Statements made by an accused which implicate his fellows, and exculpate himself, are not regarded as evidence.⁸

The statement of an accused, made after arrest, and not amounting to a confession, is not admissible in evidence against a co-accused but only against himself.⁹

A confession made at the preliminary inquiry by one of several accused persons and filed as part of the prosecution evidence at the Sessions trial can be used against the others under this section. It is not evidence, but it can be used to corroborate the other evidence against the other accused.¹⁰ There is nothing in the

¹ *Musa v. The Empress*, (1885) P. R. No. 31 of 1885 (Cr.).

² *Nga Po Tok v. King-Emperor*, (1912) 1 U. B. R. (1910-1913) 158.

³ *Queen v. Belat Ali*, (1873) 10 Beng. L. R. 453; *Empress of India v. Ganraj*, (1879) 2 All. 444; *Aung Hla v. Queen-Empress*, (1893) P. J. L. B. 7; *Emperor v. Shambhu*, (1931) 54 All. 350; *Emperor v. Bhagwandas Bisesar*, (1940) 42 Bom. L. R. 933, [1941] Bom. 27.

⁴ *Empress of India v. Ganraj*, sup., p. 446; *Gul Hassan v. The King-Emperor of India*, (1910) P. R. No. 24 of 1910 (Cr.).

⁵ *Dhanapati De v. Emperor*, [1944] 2 Cal. 312, *Queen v. Belat Ali*, (1873) 10 Beng. L. R. 453, and *Emperor v. Shambhu*,

(1931) 54 All. 350, dissented from.

⁶ *Emperor v. Shivabhai*, (1926) 28 Bom. L. R. 1013, 50 Bom. 683.

⁷ *Periyaswami Moopan*, In re, (1930) 54 Mad. 75.

⁸ *The Queen v. Keshub Bhoonia*, (1876) 25 W. R. (Cr.) 8; *Ah Foong v. Emperor*, (1918) 46 Cal. 411; *Gobaraya v. Emperor*, (1930) 26 N. L. R. 229, F.B.; *Potram v. Emperor*, (1935) 31 N. L. R. 246; *Mangal Singh v. The Crown*, (1936) 17 Lah. 547.

⁹ *Sital Singh v. Emperor*, (1918) 46 Cal. 700; *Emperor v. Abani Bhushan Chuckerbutty*, (1910) 38 Cal. 169, s.b.; *Muhammad Yunus v. Emperor*, (1922) 50 Cal. 318.

¹⁰ *Syamo Maha Patro*, (1932) 55 Mad. 903, F.B.

section which restricts the confession to one recorded before a Magistrate.¹

4. 'Proved'.—According to the Madras and the Allahabad High Courts the word 'proved' means proved before the case for the prosecution comes to an end, i.e., proved either in the course of the prosecution case or proved in some proceeding previous to the trial. Hence a confession made after the close of the prosecution case, when questions under s. 332 of the Code of Criminal Procedure are put to the accused, is not admissible under this section.²

According to the Bombay High Court a statement made by a co-accused in the course of a trial in reply to questions under s. 342, Criminal Procedure Code, implicating an accused person, is admissible as evidence against the other accused.³ Similarly, the Lahore High Court has held that a confession, made at the close of the prosecution case by one of several accused persons, can be taken into consideration against the other accused, and that this section does not justify a distinction between a confession made by an accused person before the trial and in the course of the trial.⁴

5. 'The Court may take into consideration such confession'.—This section allows a confession made by one of several persons to be taken into consideration as *against* such other person as well as *against* the person making it. It does not permit the confession to be used *in favour* of some other of the co-accused.⁵ There is nothing in the section to prevent a Court from convicting after taking the confession of a co-accused into consideration. But the High Courts in India have laid down a rule of practice, which has all the reverence of law, that a conviction founded solely on the confession of a co-accused cannot be sustained. The term 'confession' is not restricted to an unretracted confession, as once a confession is proved it may be taken into consideration. The confession of one co-accused cannot be said to be corroborated by the confession of the other co-accused. Obvious considerations of justice require that a Court, before acting upon such statements, should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to identity.⁶ This is no technical rule but one founded on long judicial experience. The Court can only treat a confession as lending assurance to other evidence against a co-accused, and a conviction based on the confession of a co-accused alone is bad in law.⁷ The Madras High Court has held that it has become a rule of practice, and it is now a rule of law that corroboration is required. One accomplice cannot corroborate another. There is no corresponding provision in English law.⁸

Confessions of a co-accused can be "taken into consideration" against the other accused, but they are not technically evidence within the definition given

¹ *Athappa Goundan*, [1937] Mad. 695, F.B.

² *Marudamuthu Padayachi*, (1931) 54 Mad. 788; *Emperor v. Mahadeo Prasad*, (1923) 45 All. 323. The Chief Court of Oudh has held likewise: *Kunwar Sen v. King-Emperor*, (1932) 8 Luck. 286.

³ *Emperor v. Cooper*, (1930) 32 Bom. L. R. 747, 54 Bom. 531.

⁴ *Dial Singh v. The Crown*, (1934) 16 Lah. 651.

⁵ *Bagga Singh v. The Empress*,

(1888) P. R. No. 39 of 1888 (Cr.).

⁶ *Emperor v. Gangapa*, (1913) 15 Bom. L. R. 975, 38 Bom. 156.

⁷ *Emperor v. Lalit Mohan Chuckerbutty*, (1911) 38 Cal. 559, S.B.; *Kashimuddin v. Emperor*, (1934) 62 Cal. 312; *Maung Mya v. The King*, [1938] Ran. 30; *Ah Phut v. The King*, [1940] Ran. 104; *Rajagopal*, [1944] Mad. 308, F.B.; *Sharif v. The Crown*, (1943) 25 Lah. 463.

⁸ *Thiagaraja Bhagavathar*, [1946] Mad. 389.

in s. 3 of the Act; and they cannot, therefore, alone form the basis of a conviction.¹ It is at best the evidence of an accomplice, and the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars (s. 114, ill. (b)). Such evidence must be dealt with by the Court in the same manner as any other evidence. The weight, however, to be attached to such evidence and the question, whether, taken by itself, it is sufficient in point of law to justify a conviction, is a question for the Judge. Unsupported by other evidence, it, however, should be taken as evidence of the weakest possible kind, being simply a statement of a third person not made upon oath or affirmation. If such confession is corroborated by other evidence, it is immaterial whether, in proving the case at the trial, the confession precedes the other evidence, or the other evidence precedes the confession.² Such evidence is not sufficient to support a conviction, even if corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction.³ But where the confession leads to the arrest and identification of the other accused, it stands confirmed and should be taken as a substantially true statement.⁴

The confession of a co-accused is on an even lower footing than the evidence of an accomplice and a conviction based on such a confession alone is bad in law. This section provides that such a confession is to be an element in the consideration of all the facts of the case, but it does not do away with the necessity for other evidence. It is the duty of the Judge, when there is no other evidence than the confession of a co-accused, to direct the jury accordingly and tell them to acquit the accused; and his omission to do so is a misdirection which will vitiate a conviction.⁵ The Rangoon High Court has held that the confession of a co-accused may be treated as evidence against an accused person in British India. The weight, however, that is to be attached to it as evidence against the accused depends upon the circumstances of the particular case. The Court is left to use its good sense in the matter.⁶

The difference between the confession of a co-accused and the evidence of an accomplice is obvious. The evidence of an accomplice is given on oath, whereas the statement of a co-accused is not made on oath. The evidence of an accomplice is capable of being tested by cross-examination while the confession of a co-accused cannot be so tested. A conviction can be based on the uncorroborated testimony of an accomplice, though as a matter of practice the Court requires corroboration in material particulars, but it cannot be so based on the statement of a co-accused.

¹ *Queen-Empress v. Khandia bin Pandu*, (1890) 15 Bom. 66, 67; *Venkatasami v. The Queen*, (1883) 7 Mad. 102; *Queen-Empress v. Nirmal Das*, (1900) 22 All. 445. See *Banna v. The Empress*, (1880) P. R. No. 29 of 1880 (Cr.); *Nga Po Mya v. Queen-Empress*, (1886) S. J. L. B. 388.

² *Empress v. Ashootosh Chuckerbutty*, (1878) 4 Cal. 483, 490, 491, F.B.; *Emperor v. Sabitkhan*, (1919) 21 Bom. L. R. 448, 43 Bom. 739; *Emperor v. Larman Jairam*, (1936) 38 Bom. L. R. 1122.

³ *Empress v. Ashootosh Chuckerbutty*, (1878) 4 Cal. 483, 491, F.B.; *Gobarayya v. Emperor*, (1930) 26 N. L. R. 229, F.B.

⁴ *Ishar Singh v. The Crown*, (1938) 20 Lah. 67.

⁵ *Giddigadu v. Emperor*, (1909) 33 Mad. 46; *Nga San Nyein v. King-Emperor*, (1917) 3 U. B. R. (1917-20) 3; *Nga Po Kauk v. King-Emperor*, (1926) 4 Ran. 45; *Emperor v. Kalwa*, (1926) 48 All. 409; *King-Emperor v. Sadashibo Manjhi*, (1939) 18 Pat. 82.

⁶ *Aung Hla v. King-Emperor*, (1931) 9 Ran. 404.

(4) The evidence of a co-accused cannot be treated on the same footing as the evidence of an accomplice.¹

Explanation.—This Explanation comes into play where the accused making the confession is charged with an offence and his co-accused with an attempt to commit, or abetment of, the same offence.

Retracted confession.—The Bombay High Court has laid down that a retracted confession, if proved to be voluntarily made, can be acted upon along with the other evidence in the case, and there is no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law.² The retraction of a confession does not cancel the confession, but it puts the Court on inquiry as to its value, its voluntary character and the probability of its being true. Hence, although as a matter of law corroboration is not necessary at all, as a general rule a retracted confession requires corroboration of some kind; but the amount of corroboration which the Court will look for depends on the circumstances of each case.³

Thus the rules regarding a confession, which is subsequently retracted, are (1) that a confession is not to be regarded as involuntary merely because it is retracted; (2) as against the maker of the confession the retracted confession may form the basis of a conviction if it is believed to be true and voluntarily made; (3) as against the co-accused, both prudence and caution require the Court not to rely on a retracted confession without independent corroborative evidence. The corroboration should not only confirm the general story of the alleged crime, but must also connect the accused with it.⁴

The Allahabad High Court has held that it does not necessarily follow that, because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support the confession, therefore the confession is to be rejected. The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, as far as the person making it is concerned, upon such belief.⁵ It is unsafe to rely on and act upon the retracted confessions unless upon a consideration of the whole of the evidence in the case the Court is in a position to come to the unhesitating conclusion that the confessions were true. It is often very difficult, if not impossible, to come to such a conclusion unless there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements. It seems, therefore, to be unsafe in the majority of cases to found a conviction on retracted confessions which are not corroborated by credible independent evidence.⁶ A retracted con-

¹ *Emperor v. Suntu*, (1917) Cr. Appeals Nos. 454 and 455 of 1917, decided by Heaton and Shah, JJ., on November 29, 1917 (Unrep. Bom.).

² *Queen-Empress v. Gharya*, (1894) 19 Bom. 728; *Queen-Empress v. Gan-gia*, (1898) 23 Bom. 316; *Queen-Empress v. Baswanda*, (1900) 2 Bom. L. R. 761, 25 Bom. 168; *Emperor v. Bhag-wandas Bisesar*, (1940) 42 Bom. L. R. 938, [1941] Bom. 27; *Bhimappa Sai-*

banna, (1945) 47 Bom. L. R. 648.

³ *Emperor v. Krishna Babaji*, (1933) 35 Bom. L. R. 371.

⁴ *Emperor v. Bhagwandas Bisesar*, sup.

⁵ *Queen-Empress v. Maiku Lal*, (1897) 20 All. 133; *Emperor v. Manohar*, [1946] All. 111.

⁶ *Queen-Empress v. Mahabir*, (1895) 18 All. 78, 81; *Queen-Empress v. Rangi*, (1887) 10 Mad. 295, 313.

fession may be taken into consideration, that is, used as evidence, not only as against the person making it, but as against persons *tried jointly* with the confessing accused for the same offence. As regards the person making it, a retracted confession may, even without any corroborative evidence, form the basis of a conviction. As regards the other co-accused, although corroborative evidence may be necessary, it is not necessary that such corroborative evidence should by itself be sufficient to support a conviction; and that a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful.¹ The retracted confession of a co-accused can undoubtedly be used or taken into consideration under this section as against the other accused, but it, like the evidence of an approver, is not sufficient for conviction unless it is corroborated in material particulars. The evidence of an approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction of an accused person if there is no other reliable evidence in corroboration as regards the identity of that accused person.²

The same is the view of the Madras High Court. It holds that it cannot be laid down as an absolute rule of the law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend upon the circumstances under which it was originally given and the circumstances under which it was retracted including the reasons given by the accused for his retraction.³ If the reasons given by an accused person for having made a confession which he subsequently withdraws are, on the face of them, false, that confession may be acted upon as it stands and without any further corroboration.⁴ A retracted confession can be used under this section where the Court is satisfied that the confession was made voluntarily in the first instance and that it is true.⁵ A retracted confession is of little value against a co-accused and the fullest corroboration is necessary. But when there is considerable circumstantial evidence as to the guilt of the co-accused, the Court is entitled to use the confession to remove any doubts that might linger in its mind.⁶

The Calcutta High Court has ruled that it is not safe to convict an accused on his retracted confession standing by itself uncorroborated,⁷ and that to place any reliance on a retracted confession against a co-accused would be most unsafe.⁸ A retracted confession should carry practically no weight as against a person other than the maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath.⁹

The Patna High Court has ruled that a retracted confession is admissible in evidence but should have no weight attached to it unless it is corroborated in material particulars or the tribunal comes to the conclusion that the statement as a whole

¹ *Emperor v. Kehri*, (1907) 29 All. 434; *Ataya v. The Crown*, (1910) P. R. No. 5 of 1911 (Cr.); *Nga Aung Thein v. The Crown*, (1901) 1 L. B. R. 133.

² *Emperor v. Nazir*, (1932) 55 All. 91; *Emperor v. Shambhu*, (1931) 54 All. 350.

³ *Queen-Empress v. Raman*, (1897) 21 Mad. 83, 88.

⁴ *Kesava Pillai*, (1929) 53 Mad. 160; *Rajagopal*, [1944] Mad. 308.

⁵ *Syamo Maha Patro*, (1932) 55 Mad. 903, F.B.

⁶ *Muneyya*, [1938] Mad. 348.

⁷ *Queen-Empress v. Jadub Das*, (1899) 27 Cal. 295; *Kali Jeeban Bhattacharyya v. Emperor*, (1936) 63 Cal. 1053.

⁸ *Emperor v. Lalit Mohan Chuckerbutty*, (1911) 88 Cal. 559, s.n.

⁹ *Yasin v. King Emperor*, (1901) 28 Cal. 689.

is a truthful statement. In either of these cases the retracted statement must be given full weight and may be used against a co-accused.¹

The Nagpur High Court has held that when it is possible to come to the conclusion that a retracted self-inculpatory confession cannot be otherwise than true it may be taken into consideration in connection with the evidence appearing in the case against the person making it as also against another person therein implicated, though it should be used with caution.² Subsequently it has held that a retracted confession, if believed to be true, may form the basis of a conviction, but as a rule of caution it is unsafe to base a conviction even of the maker on a retracted confession alone without some independent corroboration. The confession must be corroborated in material particulars so as to satisfy the Court that the confession, even though retracted, may be acted upon.³

The Chief Court of Oudh at Lucknow has held that the statement of an approver or the retracted confession of an accused cannot be made the basis of conviction unless it is corroborated sufficiently by material evidence against the co-accused.⁴ But a Court is at liberty to base a conviction on the retracted confession of an accused person if it thinks that the confession has a ring of truth about it.⁵ Where the accused retracts his confession, then no reliance can be placed upon such a retracted confession so far as the co-accused are concerned.⁶

The Chief Court of Sind has held that a retracted confession of a co-accused should not be taken into consideration against another accused who does not make it unless it is corroborated in material particulars. There must be corroboration as to the fact of the crime and as to the identity of the accused. Where the retracted confession is to be considered against the accused who makes it, then the corroboration may relate to the corroborating circumstances which satisfy the Court that the confession, though retracted, was true and voluntary.⁷

CASES.—Where the accused was convicted of house-breaking by night with intent to commit theft, and the only evidence against him was the confession of a co-accused and the fact that he pointed out the stolen property some months after the commission of the offence, it was held that the mere production of the stolen property by the accused was not a sufficient corroboration of the confession of the other accused.⁸

The appellant, who was charged under s. 411 of the Indian Penal Code with receiving stolen property, knowing it to be stolen, was tried at the same time with the thief, and one P, who was also charged with receiving stolen property from the same thief, the proceeds of the same theft, but different property. It was held that the appellant and P were not being tried jointly for the same offence but were tried together for distinct offences punishable under the same section, and, therefore, a confession made by P could not be lawfully considered against the appellant.⁹

¹ *Sheonarain Singh v. King-Emperor*, (1928) 8 Pat. 262; *Kunja Subudhi v. King-Emperor*, (1928) 8 Pat. 289; *King-Emperor v. Mangru Kisan*, (1937) 16 Pat. 612.

² *Abdul Gajoor v. Crown*, [1941] Nag. 169, *Kashimuddin v. Emperor*, (1934) 62 Cal. 312, dissented from.

³ *Bhukin v. King-Emperor*, [1948] Nag. 147.

⁴ *King-Emperor v. Maqbul Ahmad Khan*, (1931) 7 Luck. 511.

⁵ *Imamuddin v. King-Emperor*, (1934) 10 Luck. 131; *Sheoratan v. King-Emperor*, (1934) 10 Luck. 150.

⁶ *Baboo Singh v. King-Emperor*, (1935) 11 Luck. 662; *Sheoratan v. King-Emperor*, sup.

⁷ *Ismail v. Crown*, [1945] Kar. 419.

⁸ *Queen-Empress v. Dosa Jiva*, (1885) 10 Bom. 231.

⁹ *Maya Singh v. The Empress*, (1886) P. R. No. 9 of 1886 (Cr.).

31. Admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions hereinafter contained.

Admissions not conclusive proof, but may estop.

COMMENT.—This section declares that admissions are not conclusive proof of the matters admitted, but that they may operate as estoppels. 'Admission' is defined in s. 17, *supra*; 'estoppel', in s. 115, *infra*. Unless admissions are contractual or unless they constitute an estoppel they are not conclusive, but are open to rebuttal or explanation. Admissions, whether written or oral, which do not operate by way of estoppel, constitute a kind of evidence, which may be rebutted, against their makers and those claiming under them, as between them and others. A party is not bound by his own representations, where they have not been acted upon by the opposite party. If treated as admissions not acted upon, the party who made them may prove that they were not true or were mistaken. A mere admission is conclusive only where it has been acted on by the party to whom it was made. An estoppel, i.e., a representation acted on by the other party, by creating a substantive right, does oblige the estopped party to make good his representation, in other words, it is conclusive.

An estoppel differs from an admission, for it cannot generally be taken advantage of by strangers. It binds only parties and privies. An estoppel is generally said to be only a rule of evidence, for an action cannot be founded upon it. As a defence it has been held to have the effect of a rule of substantive law.

The section says that an admission is not *conclusive* proof, it does not say that an admission is not sufficient proof without corroboration. It deals with the effect as to conclusiveness of an admission. The express admissions of a party to the suit, or admissions implied from his conduct, are strong evidence against him.

The expression 'conclusive proof' is defined in s. 4, and when a fact is declared to be conclusive proof of another, a Court cannot allow evidence to be given for the purpose of disproving the fact conclusively proved. All that this section provides is that an admission, unless it operates as an estoppel, is not conclusive. What a party himself admits to be true may reasonably be presumed to be so. The person against whom it is proved is at liberty to show that it was mistaken or untrue. An admission does not estop the party who makes it; he is still at liberty to disprove it by evidence so far as regards his own interest. The rule that admissions are not conclusive is applicable to mistakes in respect of legal liability as well as to those in respect of fact. A plaintiff is not bound by an admission on a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled.¹ But, if the admission is duly proved and if the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in this Act, and there is no general principle or rule of law to prevent the Court from deciding the case in accordance with it.²

The provisions of this section are not restricted to admissions made at any particular time or place, but are wide enough to include admissions made in pleadings.

¹ *Juttendromohan Tagore v. Ganendromohan Tagore*, (1872) L. R. Sup. I. A. 47; *Jagwant Singh v. Silan Singh*, (1899) 21 All. 285; *Rani Chandra v. Chaudhuri*, (1906) 9 Bom. L. R. 267, 29 All. 184, 34 I. A. 27; *Shri Dolat-*

singhi Jaswantsinghi v. Khachar Mansur Rukhad, (1936) 63 I. A. 248, 38 Bom. L. R. 690, 60 Bom. 634.

² *Maung Mya v. Ma Tha Ya*, (1899) 2 U. B. R. (1897-1901) 377.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Statements, written or verbal, of relevant facts¹ made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:—

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

When it relates to cause of death;

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

or is made in course of business;

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or against interest of maker;

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

or gives opinion as to public right or custom, or matters of general interest;

(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or relates to existence of relationship;

(6) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or is made in will or deed relating to family affairs;

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a);

or in document relating to transaction mentioned in section 13, clause (a);

or is made by several persons and expresses feelings relevant to matter in question.

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

ILLUSTRATIONS.

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape and the actionable wrong under consideration are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned, in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day.

The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market.

A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum-book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

COMMENT.—This and the following section are exceptions to the general rule that hearsay evidence is not admissible. Hearsay evidence is excluded on the ground that it is always desirable in the interest of justice to get the person, whose statement is relied upon, into Court for his examination in the regular way in order that many possible sources of inaccuracy and untrustworthiness can be best brought to light and exposed, if they exist, by the test of cross-examination. Section 60 lays down that oral evidence must be direct.

The exceptions to the hearsay evidence have been directed by necessity. This rule excluding the hearsay evidence is relaxed so far as the statements contained in ss. 32 and 33 are concerned. The general ground of admissibility of the evidence referred to in these sections is that no better evidence could be produced. The phrase 'hearsay evidence' is not used in the Code, because it is inaccurate and vague. Before such evidence is let in the Court must arrive at a finding on evidence formally and regularly taken and recorded that one or other of the grounds specified in the section exists. The admission of such deposition in evidence without such finding is illegal.¹

Principle.—Under this section written or verbal statements of relevant facts made by a person—

(a) who is dead ;

(b) who cannot be found ;

(c) who has become incapable of giving evidence ;

(d) whose attendance cannot be procured without unreasonable delay or expense ;

are relevant under the following circumstances :—

(1) When it relates to the cause of his death.

(2) When it is made in the course of business ; such as, entry in books, or acknowledgment or the receipt of any property, or date of a document.

(3) When it is against the pecuniary or proprietary interest of the person making it or when it would have exposed him to a criminal prosecution or to a suit for damages.

¹ *Satish Chandra Seal v. Emperor*, [1944] 2 Cal. 76.

(4) When it gives opinion as to a public right or custom or matters of general interest and it was made before any controversy as to such right or custom has arisen.

(5) When it relates to the existence of any relationship between persons as to whose relationship the maker had special means of knowledge and was made before the question in dispute arose.

(6) When it relates to the existence of any relationship between persons deceased and is made in any will or deed or family pedigree, or upon any tomb-stone or family portrait, and was made before the question in dispute arose.

(7) When it is contained in any deed, will, or other document.

(8) When it is made by a number of persons and expresses feelings relevant to the matter in question.

Section 30 does not limit the operation of this section.

1. 'Statements, written or verbal, of relevant facts'.—'Verbal' means by words. It is not necessary that the words should be spoken. The words of another person may be adopted by a witness by a nod or shake of the head.¹ If the significance of the signs made by a deceased person in response to questions put to her shortly before her death is established satisfactorily to the mind of the Court, then such questions, taken with her assent or dissent to them, clearly proved, constitute a verbal statement as to the cause of her death.² In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances in which the injuries had been inflicted on her; that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution, and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions. It was held that the questions and the signs taken together might properly be regarded as 'verbal statements' made by a person as to the cause of her death within the meaning of this section, and were, therefore, admissible in evidence under that section.³

The questions put to the injured person who is unable to speak and the signs made by him in reply taken together amount to "verbal statements" within the meaning of this section.⁴

Clause 1.—Cause of death.—The statement must be as to the cause of the declarant's death, or as to any of the circumstances of the transaction which resulted in his death, that is the cause and circumstances of the death.⁵ The statement is admissible although it is made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death are not admissible.⁶ An information lodged by a person

¹ *Queen-Empress v. Abdullah*, (1885) 7 All. 385, 397, F.B.; *Chandrasekera v. The King*, [1937] A. C. 220, (1936) 39 Bom. L. R. 359, F.C.

² *Queen-Empress v. Abdullah*, *ibid.*; *Emperor v. Sadhu Charan Das*, (1921) 49 Cal. 600; *Chandrika Ram Kahar v. King-Emperor*, (1922) 1 Pat. 401; *Ranga v. The Crown*, (1924) 5 Lah. 305; *Emperor v. Motiram Raising*, (1936) 38 Bom. L. R. 818, [1937] Bom. 68.

³ *Queen-Empress v. Abdullah*, *sup.*; *Chandrasekera v. The King*, *sup.*

⁴ *Sudama v. King-Emperor*, [1949] N ag. 301.

⁵ *Venkatasubba Reddi*, (1931) 54 Mad. 931; *Mrs. M. F. Rego v. Emperor*, (1933) 29 N. L. R. 251.

⁶ *Pakala Narayana Swami v. The King-Emperor*, (1939) 66 I. A. 66, 41 Bom. L. R. 428, [1941] Ran. 789n, (1939) 18 Pat. 284.

who died subsequently, relating to the cause of his death, is admissible in evidence under this clause.¹ The statement may be oral or written. It is relevant whatever may be the nature of the proceeding in which the cause of the death of the person who made the statement comes into question.

A statement made by a person since deceased, as to the cause of the death of another, is inadmissible in evidence. The statement of one dead person is not a relevant fact with respect to the question about the death of another person.²

'Circumstances of the transaction'.—This phrase conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is narrower than *res gestæ*. Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. The condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. It is not necessary that the statement must be made after the transaction has taken place or that the person making it must be near death or that the 'circumstances' can only include the acts done when and where the death was caused. On March 20, K told his wife that he was going to Berhampore, as P's wife had written and asked him to come and receive payments due to him. On March 21, K left his house in time to catch a train for Berhampore, where P lived with his wife. On March 23, K's dismembered body was found in a trunk which had been purchased for P. It was held, on the trial of P for the murder of K, that the statement made by K to his wife was admissible in evidence under this clause as a circumstance of the transaction which resulted in K's death.³

Dying declarations are admissible under this clause. Before a dying declaration can be admitted in evidence, it must be proved to have been made by the deceased. It must narrate the cause and circumstances of his death. A conviction based upon an uncorroborated dying declaration is legal.⁴

It is no objection to the admissibility of a dying declaration that it was made in answer to leading questions or obtained by earnest and pressing solicitations.⁵ Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head, or a glance of the eye.⁶ Where a woman, whose throat had been cut, made, in answer to questions put to her by the Sub-Inspector, certain gestures, from which the latter inferred that she accused her husband of the assault, it was held that the gestures were admissible in evidence, but that the opinion of witnesses as to the meaning of the gestures was not admissible.⁷ Because the interpretation of the gestures is for the Court alone and the opinion of the witnesses as to the meaning of such gestures is not evidence. If something in a dying declaration is false, the whole declaration must not necessarily be disregarded. As a dying declaration is not made on oath and is not the subject of cross-examination, it is a weaker type of evidence than the evidence given by a witness in the witness-box. If a Judge thinks that part of a dying declaration is deliberately false, he should not act upon the other parts

¹ *Emperor v. Mohammad Shaikh*, [1942] 2 Cal. 144.

² *Emperor v. Kunwarpal Singh*, [1948] All. 122.

³ *Pakala Narayana Swami, v. The King-Emperor*, (1939) 66 I. A. 66, 41 Bom. L. R. 428, [1941] Ran. 789n, (1939) 18 Pat. 234.

⁴ *Emperor v. Kunwarpal Singh*, sup.

⁵ *Queen-Empress v. Abdullah*, (1885) 7 All. 385, 398, F.B.; *Chandrasekera v. The King*, [1937] A. C. 220, (1936) 39 Bom. L. R. 359, p.c.

⁶ *Nockabee v. Com.*, 78 Ky. 382.

⁷ *Chandrika Ram Kahar v. King-Emperor*, (1922) 1 Pat. 401; *Chandrasekera v. The King*, supra.

without definite corroboration.¹ The Madras and the Lahore High Courts have held that if the Court, after taking everything into consideration, is convinced that the dying declaration is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense.²

If the person making a dying declaration chances to live, his statement is inadmissible as a dying declaration under this section, but it might be relied on under the provisions of s. 157 to corroborate his testimony when examined.³

Proof of dying declaration.—A dying declaration may be written or oral. It may be proved by the evidence of a witness who heard it made. It cannot be treated as a deposition unless made in the presence of the accused and before a Magistrate.⁴ This case has been distinguished in a later case in which it has been held that the written record of a dying declaration, not taken down in the presence of the accused, is admissible when it is proved by a witness that the statements contained therein were, in his presence, recorded by a Magistrate and read over to the deceased who admitted their correctness.⁵ When a dying declaration is recorded by a Magistrate, who is not a committing Magistrate, it must be proved by calling the Magistrate as a witness.⁶ A dying declaration recorded by a Magistrate cannot be accepted in evidence without proof.⁷ The writing cannot be admitted to prove the statement made. It may be used to refresh the witness' memory.⁸

English law.—Under the English law the declaration must be by a person who can be a competent witness. Under the Evidence Act the question of the competence of the person to bear testimony is not one which affects the admissibility of the statement under any of the clauses of the section.

The second provision of this clause differs from the English law.

A dying declaration is admissible whether the person who made it was or was not, at the time when it was made, 'under expectation of death'. The Bombay High Court has held that the wide words used in the clause show that it is intended to cover other statements than 'dying declaration'. The words 'as to any of the circumstances of the transaction which resulted in his death' cover also other statements made by a deceased person.⁹

Under the English law the declarant—

(1) must have been in actual danger of immediate death at the time of making the declaration;

(2) must have been fully aware of his danger; and

(3) must have died.

¹ *Emperor v. Akbarali Karimbhai*, (1933) 35 Bom. L. R. 1021, 58 Bom. 31; *Nai Muddin Bisevas v. Emperor*, [1937] 1 Cal. 475, discussing *Emperor v. Premananda Dutt*, (1925) 52 Cal. 987.

² *Guruswami*, [1940] Mad. 158, F.B.; *Khurshaid Hussain v. The Crown*, [1942] Lah. 619.

³ *Emperor v. Rama Sattu*, (1902) 4 Bom. L. R. 434.

⁴ In the matter of the Petition of *Samiruddin*, (1881) 8 Cal. 211, followed in *Sarat Chandra Kar v. Emperor*, (1924) 52 Cal. 446. See, however, *Abdul Jalil v. The Empress*, (1886) P. R. No. 13 of 1886 (Cr.).

⁵ *Emperor v. Balaram Das*, (1921)

40 Cal. 358.

⁶ *Reg. v. Fata Adaji*, (1874) 11 B. H. C. 247, 248; contra, *Karuppan Samban*, (1915) 31 I. C. 359, 16 Cr. L. J. 759.

⁷ *Ghazi v. Crown*, (1911) P. R. No. 17 of 1911 (Cr.).

⁸ *Krishnama Naicken*, (1930) 54 Mad. 678.

⁹ *Shivabhai v. Emperor*, (1926) 50 Bom. 683, 28 Bom. L. R. 1013. *Aular Singh v. The Crown*, (1923) 4 Lah. 451, which lays down that this clause covers only 'dying declarations', is not correctly decided, and is dissented from in *Inayat Khan v. The Crown*, (1934) 16 Lah. 589.

Under this clause a dying declaration is admissible in civil as well as criminal cases [*vide* s. 111 (a)]. Under the English law it is admissible only in criminal cases where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration. The English rule does not rest on any sound principle, and is, therefore, not adopted in this Act.

CASES.—In proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The accused were committed for trial. Subsequently, the person assaulted died in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. It was held that the evidence was admissible either under cl. (1) of this section or s. 33 notwithstanding the additional charges before the Sessions Court.¹

A man shortly after being injured made a statement relating thereto and was later discharged from the hospital, but died of fever after a few days, there being nothing to show that his death was due to the injury inflicted. It was held that the statement as to the injury was not admissible.²

Where, in a dying declaration, the deceased stated that the accused had assaulted him "on account of enmity caused by my acting as a wizard," it was held that the statement made by the deceased was a statement "as to the circumstances of the transaction which resulted in his death," so as to be admissible under this clause.³ A statement made by the deceased pointing out the person causing his death at the identification parade held by the police is admissible as his dying declaration.⁴

Clause 2.—This clause contemplates a statement by a person whose duty it was to make such a statement or whose business was such that statements of the kind were to be expected in the ordinary course of things.⁵ "The considerations which have induced the Courts to recognize this exception appear to be principally that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other: that false entries would be likely to bring clerks into disgrace with their employers: that, as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth".⁶

'Statement in course of business'.—This clause provides that a written statement of a relevant fact made by a person who is dead is itself a relevant fact, when the statement was made by such person in 'the ordinary course of business'.

¹ *In the matter of the Petition of Rochia Mohato*, (1881) 7 Cal. 42.

² *Abdul Gani Bandukchi v. Emperor*, [1945] 1 Cal. 423.

³ *King-Emperor v. Somra Bhuiyan*, (1937) 16 Pat. 593.

⁴ *Emperor v. Mahadeo Devoo*, (1945) 47 Bom. L. R. 992.

⁵ *Soney Lal Jha v. Darabdeo Narain Singh*, (1935) 14 Pat. 461, F.B., approving *Ningawa v. Bharmappa*, (1897) 23 Bom. 63, on the interpretation of this clause, but differing on the interpretation of cl. 3.

⁶ Taylor, 12th Edn., s. 697, p. 446.

The expression 'course of business' occurs in more than one place in the Act. See ss. 16, 34, 47, 114.

The phrase 'in the ordinary course of business' is apparently used to indicate the current routine of business which was usually followed by the person whose declaration it is sought to introduce. The rule laid down in this clause extends only to statements made during the course, not of any particular transaction of an exceptional kind such as the execution of a deed of mortgage, but of business or professional employment in which the declarant was ordinarily or habitually engaged. The particulars set out in this clause, though not exhaustive, may fairly be taken as indicating the nature of the statements made in the course of business. The expression 'in the ordinary course of business' must mean in the ordinary course of a professional avocation.¹ The business referred to may be of a temporary character.² See illustrations (b), (c), (d), (g) and (f).

The entries should have been made by the deceased person himself. Entries made by another person at his instance are not admissible under this section.³ Entries in registers prepared by an Amin who is dead are admissible for proving the nature of the tenancy.⁴

English law.—There are certain important distinctions between the English and the Indian rules which regulate the reception of entries as made by a deceased person in the regular course of business. For instance, it is necessary under the English law that the party making the entry should have a personal knowledge of the facts he enters; but there is no similar provision in this Act, which simply requires that entries in accounts should, in order to be relevant, be regularly kept in the ordinary course of business; and although it may, no doubt, be important to show that the person making or dictating the entries had, or had not, a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value and not the admissibility of the entries.⁵

Under the English law, to render entries made in the course of business admissible, they must be proved to have been made contemporaneously with the facts which they relate. This clause does not contain any such restriction.

Account books.—Entries in account books should, in order to be relevant, be regularly kept in the course of business.⁶

A book of accounts may be said to be regularly kept although the book is not entered up from day to day or from hour to hour as the transactions take place.⁷

Difference between s. 32, cl. (2), and s. 34.—The plaintiff relied on entries in the handwriting of her deceased husband kept in the ordinary course of his business. It was held that entries in accounts relevant only under s. 34 are not alone sufficient to charge any person with liability: corroboration is required. But where accounts are relevant also under this clause, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under s. 34, require corroboration. Entries in accounts may in the same suit be relevant under both sections, and where this is so, the necessity of corroboration prescribed by s. 34

¹ *Ningawa v. Bharmappa*, (1897) 23 Bom. 63, 67.

² *Sheonandan Singh v. Jeonandan Dusadh*, (1908) 13 C. W. N. 71.

³ *Mussamat Naina Koer v. Gobardhan Singh*, (1916) 2 P. L. J. 42.

⁴ *Abinas Chandra Majhi v. Pratul Chandra Ghose*, (1928) 55 Cal. 1070.

⁵ *Reg. v. Hanmanta*, (1877) 1 Bom. 610, 616.

⁶ *Ibid.*

⁷ *Deputy Commissioner of Bara Banki v. Munshi Ram Parshad*, (1899) 26 I. A. 254, 27 Cal. 118, overruling *Muchershaw Bezonji v. The New Dhurumsey S. & W. Company*, (1880) 4 Bom. 576; *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*, (1926) 5 Pat. 777.

does not arise. Though accounts which are relevant under this clause do not as a matter of law require corroboration, the Judge is not bound to act on them without corroboration; that is a matter on which he must exercise his own judicial discretion as a Judge of fact.¹ The material difference as between an entry relevant under s. 34 and one relevant under s. 32 (2) is that in the former case the person who made the entry may be available as a witness while in the latter case he is not.

CASES.—Marriage register.—A register of marriages kept by a Kazi, since deceased, who celebrated the marriage, in which register was entered the amount of the dowry, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within this clause.²

Samadaskat book.—Entries of payments made by a creditor in the ledger (*samadaskat* book) belonging to a debtor fall within this clause, and although they are admissions in his own favour they are not excluded by s. 21.³

Clause 3.—‘Statement against the interest of maker.’—A statement of a deceased person in order to be admissible under this clause must be a statement of a relevant fact and must be against the proprietary or pecuniary interest of the person making it.⁴ This clause makes declarations against interest admissible in evidence. The principle upon which such statements are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true.⁵ The clause is based upon knowledge of human nature. Self-interest induces a man to be cautious in saying anything against himself. When one makes a declaration in disparagement of his own rights or interests, it is generally true, and because it is so the law has deemed it safe to admit evidence of such a declaration. Illustrations (e) and (f) apply to this clause.

This clause comprises three classes of declarations against interest: where they affect the declarant's (1) pecuniary interest; (2) proprietary interest; and (3) personal liberty or property by tending to charge him with a crime or to subject him to payment of damages. A statement made by a person, against whom there is, already, in existence evidence which would lead to his prosecution and conviction, is inadmissible in evidence under this clause.⁶

Under this clause previous statements of a dead witness (e.g. approver) in a previous trial implicating not only himself but also an absconding accused cannot be admitted for convicting such absconding accused in a subsequent trial. A man cannot by his statement expose himself to criminal proceedings when such criminal proceedings have already started. As soon as criminal proceedings have started against a person making a statement exposing himself to a criminal prosecution, the words of this clause cease to have application or force as they cannot be stretched or extended so as to cover statements made after proceedings have been instituted.⁷

The form of the declaration is immaterial; it may be verbal or written, in a deed or a will, or any other document.

Declarations against interest should, to be admissible, have been against interest at the time they were made, and it is no answer that they might possibly turn

¹ *Rampyarabai v. Balaji Shridhar*, (1904) 28 Bom. 294, 6 Bom. L. R. 50.

² *Zakeri Begum v. Sakina Begum*, (1892) 19 I. A. 157, 19 Cal. 689.

³ *Jethibai v. Pullibai*, (1912) 14 Bom. L. R. 1020.

⁴ *Soney Lal Jha v. Darabdeo Narain Singh*, (1935) 14 Pat. 461, F.B.

⁵ *Dal Bahadur Singh v. Bijai Bahadur Singh*, (1929) 32 Bom. L. R. 487, 57 I. A. 14, 52 All. 1.

⁶ *Achhailall v. King-Emperor*, (1945-46) 25 Pat. 347.

⁷ *Janu Kadir v. Crown*, [1946] Kar. 79.

out to be so subsequently.¹ The confession of an accused person who is dead implicating himself and an accomplice in a crime is admissible under this clause and is not excluded by ill. (b) to s. 30.² The question of admissibility is not a question of value.

English law.—This clause renders relevant a statement which would have exposed a man to a criminal prosecution. Thus it puts a penal interest on the same footing as a pecuniary or proprietary interest. According to English law the interest involved must be one of a pecuniary or proprietary nature; no other interest will suffice. A statement which would have exposed a man to a criminal prosecution is not admissible in evidence.

CASES.—Admissible statements.—The plaintiff sued in 1893 to recover possession of certain land. The defendants denied the plaintiff's title. The plaintiff tendered in evidence a registered mortgage-deed of adjacent land executed in 1877, which set forth the boundaries of the land comprised in the mortgage, and as one of such boundaries referred to the land in question as then belonging to the plaintiff. At the date of the deed there was no litigation existing between the present litigants, and at the date of the present suit the mortgagor was dead. It was held that the statement in the deed was admissible under this clause as a statement against the pecuniary or proprietary interest of the mortgagor.³ A full bench of the Patna High Court has dissented from this view. It has held that a statement of boundaries in a document of title between third parties, who are dead at the time the statement is sought to be put in evidence, is not generally admissible in evidence, unless it is shown that at the time the statement was made it was contrary to the interest of the maker, and that at the time it was sought to be used it was a statement of a relevant fact.⁴

A statement by a landlord, who was dead, that there was a tenant on the land, was a statement against his proprietary interest and was held admissible under this clause.⁵

A letter from the co-respondent to the petitioner in a divorce suit admitting adultery with the respondent was held to be admissible in evidence as it would expose the co-respondent to a criminal prosecution.⁶

Inadmissible statements.—A statement made by a deceased person in his will that he had spent a certain amount in effecting repairs to his house was held to be not admissible in evidence as it was not a statement made against his pecuniary or proprietary interest.⁷

A Hindu widow purported to adopt her brother's grandson, fifty-four years after the death of her husband, in pursuance of a power to adopt conferred on her by her husband. The widow obtained mutation of the name of the adopted boy in place of her own in revenue registers. In her evidence in the mutation proceedings she stated that she had her husband's authority to adopt. In a suit by the reversioners against the adopted boy to recover the property it was held

¹ *Ex parte Edwards*: In re *Tollemache*, (1884) 14 Q. B. D. 415.

² *Nga Po Yin v. King-Emperor*, (1906) U. B. R. (Evi.) (1904-06) 3.

³ *Ningava v. Bharmappa*, (1897) 23 Bom. 63.

⁴ *Soney Lal Jha v. Darabdeo Narain*

Singh, (1935) 14 Pat. 461, F.B.

⁵ *Abdul Azib Molla v. Ebrahim Molla*, (1904) 31 Cal. 965.

⁶ *Cockman v. Cockman*, (1933) 56 All. 570.

⁷ *Narhari v. Ambabai*, (1919) 22 Bom. L. R. 57, 44 Bom. 192.

that the evidence of the widow in the mutation proceedings was not admissible either under this clause or under s. 33.¹

Clause 4.—‘Opinion.....as to.....public right or custom.’—The admissibility of declarations of deceased persons in cases of public right or custom, or matters of public or general interest, is allowed, as these rights or customs are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; direct proof of their existence is not, therefore, demanded.²

The principle on which the exception of reputation regarding public rights rests is this—that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject, and such concurrence is presumptive evidence of the existence of an ancient right, of which direct proof cannot be given in most cases.³

The admissibility of the declarations of deceased persons in such cases is sanctioned, because in local matters, in which the community are interested, all persons living in the neighbourhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject.⁴

Public and general rights.—Public rights are those common to all members of the State, e.g., rights of highways or of ferry or of fishery. General rights are those affecting any considerable section of the community, e.g. disputes as to the boundaries of a village. The right must have been one of whose existence the declarant should be aware. If the declaration is made otherwise than upon the declarant's own knowledge it will be rejected.

This clause is inapplicable to a document purporting to deal with the rights of a private individual as against the public, in which the interests of the individual form the subject-matter of the statement.⁵ A map prepared by a person, who is dead, in a previous case not *inter partes*, showing the limits of a particular district, is not admissible as it is not a matter of public right or public or general interest within the meaning of this clause.⁶

Illustration (i) exemplifies this clause.

Statement before any controversy had arisen.—The declarations should have been made *ante litem motam*, i.e., before the beginning of any controversy and not simply before the commencement of any suit involving the same subject-matter. The operation of bias is thus excluded.⁷ Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is inadmissible under this clause if it appears that such statements were made after a controversy as to the custom had arisen.⁸

¹ *Dal Bahadur Singh v. Bijai Bahadur Singh*, (1929) 32 Bom. L. R. 487, 57 I. A. 14, 52 All. 1.

² *The Queen v. Inhabitants of Bedfordshire*, (1855) 4 E. & B. 535.

³ *Wright v. Tatham*, (1838) 5 Cl. & F. 670.

⁴ Per Lord Campbell, C.J., in *The Queen v. Inhabitants of Bedfordshire*, (1855) 4 E. & B. 535, 542.

⁵ *Heiniger v. Droz*, (1900) 3 Bom. L. R. 1, 25 Bom. 433.

⁶ *Kesho Prasad v. Bhagjogna Kuer*, (1937) 39 Bom. L. R. 731, 16 Pat. 258, P.C.

⁷ *Berkeley Peerage Case*, (1811) 4 Camp. 401, 417.

⁸ *Amina Khatun Musammat v. Khalil-ur-Rahman Khan*, (1933) 8 Luck. 445.

To render a statement inadmissible as having been made *post litem motam* the same thing must be in controversy both before and after it is made.¹

Clause 5.—Statement as to existence of relationship.—Statements relating to the existence of any relationship between persons alive or dead as to whose relationship the declarant has *special means* of knowledge are admissible if they are made before the question in dispute was raised. The clause lays down two conditions: (1) the statement must be one made by a person having special means of knowing the relationship to which it relates, and (2) that it must have been made *ante litem motam*, i.e., made by him before the question in dispute was raised.² Special knowledge is to be presumed in the case of members of the family.³ Statements made by deceased members of a family are admissible in evidence to prove pedigree if they are made before there was anything to throw doubt upon them.⁴ A statement of one's age made by a deceased person having special means of knowledge is admissible under this clause.⁵ It is not necessary that the statement should have been made in a judicial proceeding.⁶ Entries made in books of priests (*pandit's bahis*) if made by persons who are dead or cannot be found are relevant only under this clause and cl. (6) read with s. 90 and are admissible only if all the requirements laid down therein are proved, and among other things the identity of the maker of those statements is established.⁷ As the question as to the existence of any relationship also includes the question as to the commencement of that relationship, declarations of deceased competent declarants are admissible to prove a person's date of birth, and, consequently his age, minority or majority or the order in which the members of the family are born. Such declarations are also admissible to prove parentage, names of relations or the date of death of a member of the family as death implies termination of a relationship, just as birth implies its commencement.⁸

'Before the question in dispute was raised.'—This does not mean simply before a suit has been filed; but before the dispute which afterwards culminates in a suit has arisen.⁹

Illustration (k) exemplifies this clause. See also ill. (l).

English law.—According to English law, a certain degree of relationship is necessary in order to make such statements admissible. Declarations respecting matters of pedigree are not, therefore, admissible if they proceed from illegitimate members or friends or servants, or neighbours of the family in question. This Act only requires the existence of any special means of knowledge of the relationship on the part of the person making the statement.

Marriage.—Strict proof of marriage is necessary in certain criminal offences, e.g., bigamy, adultery, enticing away a married woman. This clause has no application in such cases.¹⁰ Otherwise general reputation of marriage is admissible.

¹ *Kalka Parshad v. Mathura Parshad*, (1908) 35 I. A. 166, 10 Bom. L. R. 1088, 30 All. 510.

² *Musammat Biro v. Atma Ram*, (1937) 64 I. A. 92, 39 Bom. L. R. 726.

³ *Prabhakar v. Sarubai*, [1942] Nag. 779.

⁴ *Abdul Ghafur v. Hussain Bibi*, (1930) 33 Bom. L. R. 420, 58 I. A. 188, 12 Lah. 336; *Gokhul Pande v. Baldeo Sukul*, (1927) 7 Pat. 90.

⁵ *Abdul Subhan Khan alias Khalil-ur-Rahman v. Nusrat Ali Khan*, (1936) 12 Luck. 606.

⁶ *Musammat Biro v. Atma Ram*, sup.

⁷ *Hazura Singh v. Molindar Singh*, (1937) 18 Lah. 732, disapproving *Jahangir v. Sheoraj Singh*, (1915) 37 All. 600.

⁸ *Mahadeo Prasad v. Ghulam Mohammad*, [1946] All. 649.

⁹ *Rup Kishor v. Patrani*, (1927) 50 All. 152; *Kalka Parshad v. Mathura Parshad*, (1908) 35 I. A. 166, 10 Bom. L. R. 1088, 30 All. 510.

¹⁰ *Empress v. Pitambur Singh*, (1879) 5 Cal. 566, F.B.

An admission by a plaintiff of her marriage with a person made before there was any dispute about such marriage may be proved by or on her behalf under s. 21(1) read with this clause.¹

CASES.—The statement in a genealogical table by a member of the family² or by a person having special means of knowledge³ was held to be relevant under this clause. A genealogical table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for the purposes of a former suit, was held to be inadmissible in evidence, having been made without the personal knowledge and belief which must be found or presumed in any admissible statement by a deceased person.⁴ The plaintiff, to prove his relationship, produced a pedigree which was prepared from the statements of bards and papers produced by them, some time ago by a Raja to settle the class of Thakurs to which he belonged. It was held that the pedigree was not admissible; since neither any of the bards nor the Raja who assembled the bards of the family and with their assistance had the pedigree drawn up was called as a witness and no proof was given that they were within any of the descriptions given by this section which made it unnecessary to call them.⁵

Evidence of competent witnesses as to their having heard the names of the ancestors recited by members of the plaintiff's family on ceremonial and other occasions was held to be admissible evidence in support of the pedigree on which the plaintiff based his claim. Such evidence is not open to criticism merely on the ground that the witnesses are relatives.⁶

The oral evidence in a case consisted of statements made by the plaintiffs as to their descent, the information as to which they had received from their ancestors. Objection was taken that such of those statements as were made since 1847 were inadmissible in evidence under cls. (5) and (6) as being *post litem*. The Privy Council held that they were admissible, the heirship of the then claimants not being really in dispute at that time.⁷

A statement as to the age of a member of a family made by a sister was held admissible after her death.⁸ Statements of the father (since deceased) in his written statement in a maintenance case filed by the mother of the child, denying the paternity of the child, were not within this clause or s. 33 and were not admissible in evidence as against the child. The judgment of the Magistrate in the same proceedings, holding that the child was not the child of that father, was not binding upon the child and was inadmissible in evidence. Statements by the mother that the child was begotten by a person other than her husband were inadmissible against the child.⁹

¹ *Mussamat Bashiram v. Mohamad Husain*, (1941) 16 Luck. 615.

² *Shyamanand Das Mohapatra v. Rama Kanta Das Mohapatra*, (1904) 32 Cal. 6.

³ *Lal Harihar Partap Baksh Singh v. Bisheshwar Baksh Singh*, (1927) 3 Luck. 326; *Sarfaraz Khan v. Musamat Rajana*, (1928) 4 Luck. 39; *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani*, (1901) 29 I. A. 24, 4 Bom. L. R. 167, 29 Cal. 187.

⁴ *Rai Jagatpal Singh v. Raja Jogeshwar Baksh Singh*, (1902) 30 I. A. 27, 25 All. 143.

⁵ *Surjan v. Sardar*, (1900) 2 Bom. L. R. 942, 27 I. A. 183, 23 All. 72.

⁶ *Debi Pershad Chowdhry v. Rani Radha Chowdhurani*, (1904) 31 I. A. 160, 32 Cal. 84.

⁷ *Bahadur Singh v. Mohar Singh*, (1901) 29 I. A. 1, 4 Bom. L. R. 233, 24 All. 94.

⁸ *Oriental Government Security Life Assurance Company, Limited v. Narasimha Chari*, (1901) 25 Mad. 183.

⁹ *Karapaya Servai v. Mayandi*, (1933) 12 Ran. 243, 36 Bom. L. R. 394, P.C.

For the purpose of the decision of a question of limitation, it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to them by relatives of the plaintiff, who were since deceased, relating to the date of the plaintiff's birth. It was held that such statements were admissible in evidence.¹ A plaint in a former suit verified by a deceased member of the family, and as such having special means of knowledge, was held admissible under this clause to prove the order in which certain persons were born and their ages.² In an action to recover the amount due upon certain mortgages, the defendant pleaded that he was an infant when he executed them. As evidence in support of this plea there was tendered at the trial an entry, recording the date of the defendant's birth made by the defendant's deceased father in a book in which he made similar entries with regard to his family. It was held under an Ordinance exactly similar to the Evidence Act that having regard to ill. (l) to this section the entry was admissible in evidence.³

Clause 6.—This clause differs from cl. (5) in three respects.—(1) Under cl. (5) the statement may relate to the existence of relationship between living or dead persons: under this clause the statement must relate to the existence of relationship between dead persons.

(2) Under cl. (5) the person making the statement must be proved to have had some special means of knowledge on the subject; under this clause such proof is unnecessary.

(3) Under cl. (5) the statement may be oral or documentary: under this clause, the statement must have been made in some document of the nature mentioned therein.

There is a difference in the language of sub-sec. (5) and sub-sec. (6), but it has been repeatedly laid down by the Judicial Committee of the Privy Council that it is only a statement made after the question has become a disputed one that is inadmissible.⁴

Statement as to relationship in will or deed.—Under this clause statements relating to the existence of relationship between deceased persons made before the question in dispute was raised are admissible when they are contained in a will or a deed or in a family pedigree,⁵ or upon a tombstone. It is not necessary as in cl. (5) that the statements should have been made by a person who had special means of knowledge, simply because it is not probable that a person would insert in a will or a solemn deed any matter the truth of which he did not know. The statement should not have been made in the testator's own interest or in view of contemplated litigation.⁶

The word 'verbal' used in the beginning of this section has no application to this clause.

Illustrations (l) and (m) exemplify this clause.

¹ *Ram Chandra Dutt v. Jogeswar Narain Deo*, (1893) 20 Cal. 758. *Bipin Behary Daw v. Sreedam Chunder Dey*, (1886) 13 Cal. 42, may be considered as overruled.

² *Dhanmull v. Ram Chunder Ghose*, (1890) 24 Cal. 265, 268; *Gokhul Pande v. Baldeo Sukul*, (1927) 7 Pat. 90; *Mauladad Khan v. Abdul Sattar*, (1917) 39 All. 426.

³ *Mahomed Syedol Ariffin v. Yeoh* L. E.—7.

Ooi Gark, (1916) 43 I. A. 256, 19 Bom. L. R. 157.

⁴ *Musammal Jainath Kuar v. Dampal Singh*, (1946) 22 Luck. 249.

⁵ *Jang Bahadur Singh Thakur v. Arjun Singh Thakur*, (1927) 3 Luck. 256.

⁶ *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*, (1926) 5 Pat. 777.

Difference between clauses (5) and (6).—Clause (5) refers to statements relating to the existence of any relationship between persons alive or dead, and the statement is to be made by a person who had special means of knowledge, that is, it imposes the restriction that the person making the statement should have special means of knowledge. See ill. (k). Clause (6) refers to the existence of relationship between deceased persons only; and it imposes no such restriction as under cl. (5). It is enough if the statement is made in a will or deed relating to the affairs of the family or in any family pedigree, etc., no matter by whom it was made.

Clause (6) also refers to pedigree, but differs from cl. (5) in this—that in cl. (5) the evidence is the declaration of the person deceased or otherwise unproducible, in cl. (6) the evidence is that of things, such as genealogical trees, tombstones, etc.

The statement in cl. (5) may be either written or verbal; the statement in cl. (6) must always be written as the evidence therein is that of things.

CASES.—Horoscope.—In a suit to recover possession of immoveable property, the plaintiff tendered in evidence a horoscope which, he said, had been given to him by his mother and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. It was held that the horoscope was not admissible.¹ This case has been distinguished in a Madras case where the defendants relied on a horoscope produced by the plaintiff's mother and which had been a public record from a period *ante litem motam* and was put in as an admission under ss. 17 and 18.²

Pedigree table.—In a suit for an inheritance claimed by the plaintiffs, alleging themselves to be collateral relations and heirs of the last male owner, through an ancestor common to him and to them, a pedigree table was put in in evidence. The persons from whose statements at no distant date the pedigree had been drawn up were absent, and it had not been shown that this had been for any one or other of the reasons contained in this section. It was held that the pedigree table was inadmissible.³ A family pedigree was sought to be proved by the books kept by the family chronicler prepared by the chroniclers from time to time from the information supplied by members of the family. It was held that the pedigree would be admissible under this clause and also under cl. 2.⁴

Clause 7.—A statement contained in any deed, will, or other document which relates to a transaction by which a right or custom in question was created, modified, recognized, asserted, or denied, is admissible under this clause. A statement in any relevant document, however recent, and though not more than thirty years old, is admissible. Statements of facts contained in a will of a deceased person tending to show that the properties are his self-acquisitions are admissible.⁵

The word 'verbal' used in the beginning of this section naturally does not apply to this clause as well.

Under this clause the word 'right' will include both public and private rights. But, under the English law, evidence of reputation is not admissible when private rights are concerned.

¹ *Ram Narain Kallia v. Monee Bibee*, (1888) 9 Cal. 613; *Satis Chunder Mukhopadhyaya v. Mohendro Lal Pathak*, (1890) 17 Cal. 849.

² *Raja Goundan v. Raja Goundan*, (1898) 17 Mad. 134.

³ *Surjan v. Sardar*, (1900) 2 Bom. L. R. 942, 27 I. A. 183, 23 All. 72.

⁴ *Mohansing v. Dalpatsingh*, (1921) 24 Bom. L. R. 289, 46 Bom. 753.

⁵ *Venkataramayya v. Seshamma*, [1937] Mad. 1012.

Clause 8.—When a number of persons assemble together to give vent to one common statement, which statement expresses the feelings or impressions made in their minds at the time of making it, that statement may be repeated by the witnesses, and is evidence.¹ Thus, where a person was charged with raising a seditious mob, expressions of alarm by persons in the neighbourhood were admitted in evidence to show the feelings produced by the gathering;² evidence that a plaintiff was publicly laughed at in consequence of a libel was admitted to prove that the libel referred to the plaintiff.³ Illustration (n) is intended to exemplify this clause.

33. Evidence given by a witness in a judicial proceeding,¹ or before any person authorized by law to take it,² is relevant³ for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead⁴ or cannot be found,⁵ or is incapable of giving evidence,⁶ or is kept out of the way by the adverse party,⁷ or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable⁸:

Provided—

that the proceeding was between the same parties⁹ or their representatives in interest¹⁰;

that the adverse party in the first proceeding had the right and opportunity to cross-examine¹¹;

that the questions in issue were substantially the same in the first as in the second proceeding¹².

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

COMMENT.—Principle.—Evidence of depositions in former trials is admissible as it forms an exception to the hearsay rule. Depositions are in general admissible only after proof that the persons who made them cannot be produced before the Court to give evidence. It is only in cases where the production of the primary evidence is beyond the party's power that secondary evidence of oral testimony is admissible. Non-compliance with the provisions of this section is not cured by the fact that counsel for the accused gives his consent thereto.⁴

It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a better opinion as to his reliability than is possible from reading a statement or deposition given by that witness in a previous judicial proceeding or in an early stage of the same judicial proceeding.

Where a statute (e.g. the Evidence Act, 1872,) makes provision for exceptional cases where it is impossible for the witness to be before the Court, the Court must be

¹ *The Queen v. Ram Dutt Chowdhry*, (1874) 23 W. R. (Cr.) 35, 38.

² *Redford v. Birley*, (1822) 1 St. Tr. N. S. 1071, 3 Stark. 76.

³ *Cook v. Ward*, (1930) 4 M. & P. 99.

⁴ *Ghulam Haidar v. The Crown*, (1929) 10 Lah. 837.

careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved.

In a civil case a party can, if he chooses, waive the proof; but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence, and even the consent of the accused's counsel does not do away with the necessity of the Court being satisfied by proof of that fact.

It is not necessary in every case where a witness is unable to attend the Court on the ground of physical incapacity that there must be evidence of a medical man. There may be many cases in which the facts are such that the incapacity can be proved by a lay witness.¹

The section enumerates the cases in which the evidence given by a witness (a) in a judicial proceeding, or (b) before any person authorized by law to take it, is relevant in a subsequent judicial proceeding or a later stage of the same proceeding. Such cases are five in number, viz.

- (a) when the witness is dead ;
- (b) when he cannot be found ;
- (c) when he is incapable of giving evidence ;
- (d) when he is kept out of the way by the adverse party ; and
- (e) when his presence cannot be obtained without an amount of delay or expense which the Court considers unreasonable.

The use of such secondary evidence is limited by three provisions. Such evidence will be only admissible—

- (1) if the proceeding was between the same parties, or their representatives in interest ;
- (2) if the adverse party in the first proceeding had the right and opportunity to cross-examine ; and
- (3) if the questions in issue were substantially the same in the first as in the second proceeding.

Evidence given on a different occasion is also admissible to contradict a witness (s. 155) or to corroborate him (s. 157).

1. 'Evidence given... in a judicial proceeding.'—"It must be proved that the witness was *duly sworn* in some judicial proceeding, to the authority of which the party, against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the *right of cross-examination*."² Evidence of a witness in a proceeding subsequently pronounced to be *coram non judice* is not admissible if the witness is dead, on a re-trial before a competent Court.³

2. 'Before any person authorized by law to take it.'—A deposition is inadmissible unless it was taken by an officer or other person authorised by law.

3. 'Is relevant.'—Depositions which satisfy the conditions laid down in this section are relevant for the purpose of proving the truth of the facts which they state. They are, however, open to all the objections which might have been raised if the witness himself had been present during the trial. Leading and other illegal questions are, therefore, not allowed to go in.

The burden of proving that the conditions essential to the admissibility of depositions under this section have been complied with lies on the person who tenders the evidence. The depositions of witnesses given in a counter-case may

¹ *Chainchal Singh v. Emperor*, (1945) 48 Bom. L. R. 284, P.C.

² Taylor, 12th Edn., s. 465, p. 320.

³ *Rami Reddi*, (1881) 3 Mad. 48,

51; *Buta Singh v. The Crown*, (1926) 7 Lah. 396; *Sankappa Rai v. Koraga Pujary*, (1930) 54 Mad. 561.

be used as evidence against them on their trial as accused persons, but such depositions can only be evidence against the persons making them.¹

Objections as to the admissibility of evidence should be raised at the trial and at any rate in the Court of first appeal, and will not as a general rule be entertained by the High Court if raised for the first time in second appeal.²

4. 'When the witness is dead.'—The death of the witness whose evidence is to be admitted should first be strictly proved unless it is admitted on the other side.³ The deposition of a witness taken before one Magistrate is admissible in evidence at a re-trial before another Magistrate if the witness was dead at the time of re-trial.⁴

The deposition of a witness, who was not cross-examined before the committing Magistrate and who died before the trial, was held admissible because the accused had the right and opportunity of cross-examining him notwithstanding the omission of their pleader to avail himself of that right.⁵ But if a witness under examination by a Court dies before his cross-examination is completed, no part of his evidence can be made use of.⁶

5. 'Cannot be found.'—Proof of a diligent search is necessary before tendering the evidence of a witness who cannot be found. A Sessions Judge, finding that the witnesses, who had been summoned to give evidence for the prosecution, did not appear on the date fixed, adjourned the case for eighteen days and ordered fresh summonses to be issued. On the adjourned date, the witnesses were again absent. Thereupon the Sessions Judge made use of the evidence, which those witnesses had given before the committing Magistrate, purporting to do so under this section. It was held that the evidence could not be so used; but the Sessions Judge ought to have directed warrants to issue to enforce the attendance of the prosecution witnesses and compelled their attendance in Court.⁷

Section 512 of the Code of Criminal Procedure supersedes this section to a certain extent. It provides that if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions, and that such depositions may be used at the subsequent trial of the absconder, if the witnesses are dead or otherwise incapable of appearing.

6. 'Incapable of giving evidence.'—The incapacity contemplated by the section is not necessarily a permanent one and that something short of permanent incapacity might satisfy the words of the section.⁸ The fact of incapacity must be strictly proved.⁹

Precise evidence should be given as to the nature of the illness and the incapacity to attend. When a witness is shown to be insane, his evidence, given in a former judicial proceeding, is relevant in a subsequent judicial proceeding.

¹ *Queen-Empress v. Ganu Sonba*, 2 Bom. L. R. 761, 25 Bom. 178. (1888) 12 Bom. 440.

² *Radha Kishan v. Kedar Nath*, (1927) 50 All. 113. (1924) 46 All. 815.

³ *Sajjan Singh v. The Crown*, (1925) 28 All. 98. 6 Lah. 437.

⁴ *Lekal v. The Crown*, (1927) 8 Lah. 570.

⁵ *Queen-Emp. v. Baswanta*, (1900) 48 Bom. L. R. 284, F.C.

⁶ *Narsingh Das v. Gokul Prasad*, (1927) 50 All. 113.

⁷ *Emperor v. Dost Muhammad*, (1905) 28 All. 98.

⁸ *In the matter of the Petition of Asgur Hossein*, (1881) 6 Cal. 774.

⁹ *Chainchal Singh v. Emperor*, (1945) 48 Bom. L. R. 284, F.C.

7. 'Kept out of the way by the adverse party.'—The admissibility of the evidence given by a witness who is kept out of the way by the adverse party is admissible upon the broad principle of justice which will not permit a party to take advantage of his wrong.

8. 'Presence cannot be obtained without an amount of delay or expense. etc.'—It is only in extreme cases of expense or delay that the personal attendance of a witness is dispensed with, and his evidence given in a former inquiry referred to.¹ The Judge must satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. Mere consent of the prosecutor and the accused's pleader to that effect is not sufficient.² Inconvenience to witnesses or amount of expense is no ground where the entire case rests on the evidence of those witnesses.³

9. 'Proceeding....between the same parties.'—The two suits must be brought by, or against, the same parties, or their representatives in interest, at the time when the suits are proceeding and the evidence is given.⁴ This proviso is based on the grounds of reciprocity, because the right to use evidence being co-extensive with the liability to be bound thereby, the adversary in the second suit has no power to offer evidence in his own favour which, had it been tendered against him, would have been clearly inadmissible. R charged A with breach of trust, and S gave evidence in support of the charge. A being acquitted, R was tried for making a false charge and S for perjury. It was held that the depositions given by witnesses in the first case could be used against R in the second case, but not against S under this section.⁵

10. 'Representatives in interest.'—This proviso is a departure from the English law on the subject, and it is not requisite that the parties to the second proceeding should be persons who derive their title through or claim under the parties to the first proceeding and thus be their privies in estate. In other words, differing herein from the English rule, this proviso does not require that the party to the first proceeding should be privy in estate with or the predecessor-in-title of the party in the second. This proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which the facts which the evidence states were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz., (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. If both the above conditions are fulfilled, the relevant party to the first proceeding in fact represented in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and

¹ *Empress of India v. Mulu*, (1880) 2 All. 646.

² *Re Annavi Muthiriyar*, (1915) 39 Mad. 449; *Emperor v. Savliniya Miya-bhai*, (1944) 46 Bom. L. R. 589; *Emperor v. Gajendra Mohan Kar*, [1943] 1 Cal. 405.

³ *Queen-Empress v. T. Burke*, (1884) 6 All. 224.

⁴ *Sitanath Dass v. Mohesh Chunder Chuckerbati*, (1886) 12 Cal. 627.

⁵ *Rami Reddi*, (1881) 3 Mad. 48, 51. See *Emperor v. Kadhe Mal*, (1919) 42 All. 24.

may rightly be described as a "representative in interest" of the party to the second proceeding within the wider meaning of those words as laid down above.¹

Partners and joint contractors who are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts are regarded as privies in estate, and are included in the term 'representatives in interest.'²

11. 'Adverse party... had the right and opportunity to cross-examine.'—The adverse party must have both the right and the opportunity of cross-examining. The word 'and' cannot be read as 'or.'³ This proviso is based on the fundamental principle in the administration of justice that every man should have an opportunity of cross-examining witnesses whose evidence is to be used against him. If the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then same in effect as if he had cross-examined. It is not necessary that the opponent should have exercised his right of cross-examining, for the depositions will be relevant if he deliberately forebore from, or waived the absence of, an opportunity for cross-examining.⁴

The evidence of a witness, who has been examined in open Court is not inadmissible in the course of the same judicial proceeding merely because it is impossible to cross-examine him on account of his having died between his examination-in-chief and his cross-examination, but the weight to be attached to his testimony depends on the circumstances of each case.⁵

12. 'The questions in issue were substantially the same in the first as in the second proceeding.'—It is not necessary that all the questions in issue in the two proceedings should be substantially the same, it is sufficient if the principal question in issue in both the proceedings is identical.⁶ The principle involved in requiring identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may be given in the subsequent proceedings. Thus, "if in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies though the last suit relates to other lands".⁷ Whether the questions at issue are substantially the same, depends upon whether the same evidence is applicable, although different consequences may follow from the same act.⁸ Where the same question is substantially in issue in both the proceedings, it does not matter that they relate to different transactions or properties.⁹ A prosecution was instituted

¹ *Krishnayya Rao v. Venkata Kumara Mahipati*, (1933) 35 Bom. L. R. 1076, 60 I. A. 336, 57 Mad. 1.

² *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*, (1926) 5 Pat. 777.

³ *Dal Bahadur Singh v. Bijai Bahadur Singh*, (1929) 32 Bom. L. R. 487, 57 I. A. 14, 52 All. 1.

⁴ *M'Combie v. Anton*, (1843) 6 M. & G. 27; *Gurudin v. Emperor*, (1934) 31 N. L. R. 276; *Queen-Empress v. Ramchandra Govind Harshe*, (1895) 19

Bom. 749; *Sadu v. The Empress*, (1855) P. R. No. 26 of 1885 (Ci.).

⁵ *Ahmad Ali v. Joti Prasad*, [1944] All. 241.

⁶ *Krishnayya Rao v. Venkata Kumara Mahipati*, (1933) 35 Bom. L. R. 1076, 60 I. A. 336, 57 Mad. 1.

⁷ *Rami Reddi*, (1881) 3 Mad. 48, 52; Taylor, 12th Edn., p. 467.

⁸ *In the matter of the Petition of Rochia Mohato*, (1881) 7 Cal. 42.

⁹ *Llanover v. Homfray: Phillips v. Llanover*, (1881) 19 Ch. D. 224.

by S against N at the instance and on behalf of F for criminal trespass in respect of a certain house, and on his own behalf for assault and insult. S gave evidence at the trial in support of these charges. F subsequently brought a civil suit against N for possession of the same house under s. 9 of the Specific Relief Act. S died before the institution of the civil suit. At the trial of the civil suit the deposition of S in the criminal Court was tendered by F as evidence on the issue of possession. It was held that, S being dead and the proceedings being between the same parties and the issues being substantially the same, the deposition of S was admissible.¹ In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The accused were committed for trial. Subsequently the person assaulted died in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charges of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial. It was held that the evidence was admissible either under s. 32, cl. (1), or this section, notwithstanding additional charges before the Sessions Court.²

Explanation.—The Explanation is intended to do away with the objection that, in criminal cases, the Crown is the prosecutor.³ The effect of the Explanation is that the deposition taken in criminal proceedings may be used in a civil suit, and *vice versa*.

The deposition of a witness taken in the course of an enquiry before the Coroner cannot, in the event of death of the witness, be taken in evidence at the trial of the case in the High Court, because the enquiry before the Coroner is not a proceeding between the prosecutor and the accused.⁴

The introduction and use of depositions taken in criminal cases in bulk in a subsequent civil suit for the purpose of either contradicting or discounting the evidence of witnesses given in the suit, are illegitimate, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered.⁵

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account, regularly kept in the course of business,¹ are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence² to charge any person with liability.

ILLUSTRATION.

A sues B for Rs. 1,000, and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt.

COMMENT.—**Principle.**—This section is based upon the principle that entries made regularly in the course of business are sure to be accurate. In all such entries the writer has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth.

¹ *Foolkissory Dasse v. Nobin Chunder Bhunjo*, (1895) 23 Cal. 441.

² *In the matter of the Petition of Rochia Mohato*, (1881) 7 Cal. 42.

³ *Soojan Bibee v. Achmut Ali*, (1874) 14 Beng. L. R. (Appx.) 3.

⁴ *Emperor v. Mahomed Yusuf*, (1932) 35 Bom. L. R. 1020.

⁵ *Bal Gangadhar Tilak v. Shri Shrinivas Pandit*, (1915) 17 Bom. L. R. 527, 42 I. A. 135, 39 Bom. 441.

This section provides (1) that entries in books of account regularly kept in the course of business are relevant and therefore admissible whenever they refer to a matter into which the Court has to enquire; and (2) that such entries though admissible are not alone sufficient to charge a person with liability unless corroborated by other evidence.¹ Account books are admissible in evidence without any formal proof that they were regularly kept in the course of business.²

Though the actual entries in books of account, regularly kept in the course of business are relevant, such a book is not by itself relevant to raise an inference from the absence of any entry relating to a particular matter.³

Such books may be admissible under s. 32(2) as statements made by a person in the ordinary course of business or entries made by him in books kept in the ordinary course of business. Such books are also relevant under s. 159 to refresh the memory of the writer.⁴

English law.—Under English law such entries are not admissible in evidence on the ground that to admit such evidence is a violation of the rule that no man shall be allowed to manufacture evidence in favour of himself. To make entries in the course of business admissible, they must be shown to have been made contemporaneously with the acts to which they relate. Even then such entries are evidence only of those things which it was the duty of the person to enter, and are no evidence of independent collateral matters. There is no such restriction in this section.

1. 'Regularly kept in the course of business.'—The Privy Council has laid down that the admissibility of books of account regularly kept in the course of business is not restricted to books in which entries have been made from day to day, or from hour to hour, as transactions have taken place. The time of making the entries may affect the value of them but should not, if they have been made regularly in the course of business afterwards make them irrelevant.⁵

Account books containing entries not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the facts stated, if regularly kept in the course of business, are admissible as evidence under this section.⁶

Entries in an account book which is not regularly kept in the course of business are not admissible in evidence under this section.⁷

2. 'Such statements shall not alone be sufficient evidence'.—Entries in accounts relevant only under this section are not by themselves alone sufficient to charge any person with liability. Corroboration is required. The section does not mean that there should be independent evidence to prove each and every transaction entered in a book of account. What is necessary to be seen in each case is whether besides the entries in a book of account, there is any evidence to prove that the transactions referred to in those entries actually took place. Such

¹ *Gopewar Sen v. Bejoy Chand Mahatab*, (1928) 55 Cal. 1167.

² *Emperor v. Narbada Prasad*, (1929) 51 All. 864.

³ *The Queen-Empress v. Grees Chunder Banerjee*, (1884) 10 Cal. 1024.

⁴ *Bhoj Hong v. Ramnathan*, (1902) 4 Bom. L. R. 378, 29 I. A. 43, 29 Cal. 334.

⁵ *The Deputy Commissioner of Bara Banki v. Ram Parshad*, (1899)

27 Cal. 118, 26 I. A. 254, overruling *Munchershaw Bezongji v. The New Dhurumsey S. & W. Company*, (1880)

4 Bom. 576; *Emperor v. Narbada Prasad*, (1929) 51 All. 864; *Gulab Chand, Lala v. Manni Lal, Lala*, (1940) 16 Luck. 302.

⁶ *Reg. v. Hanmanta*, (1877) 1 Bom. 610.

⁷ *Vilhu v. Thakurdas*, [1949] Nag. 307.

corroboration will be best afforded by the evidence of the person who wrote the books of account and in whose presence the transactions took place.¹ Where accounts are relevant also under s. 32(2), they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under this section, require corroboration. Entries in account may, in the same suit, be relevant under both the sections; and in that case the necessity for corroboration does not arise.²

One party, by merely producing his own books of account, cannot bind the other.³

35. An entry in any public or other official book, register or record,¹ stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

Relevancy of entry in public record made in performance of duty.

COMMENT.—Principle.—This section is based upon the circumstance that in the case of public documents entries are made in discharge of public duty by an officer who is an authorized and accredited agent appointed for the purpose. The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity.

The section is applicable to entries in public records of an Indian State or a foreign country.⁴

Scope.—In a case the Calcutta High Court held that the section is confined to that class of cases where a public officer has to enter in a register or other book some actual fact which is known to him.⁵ But this case has not been approved of in a subsequent case in which it is held that certified copies of entries in a register kept by a public servant under a statute are admissible in evidence.⁶ However, the privilege given to public record under this section does not extend to entries which the public officer is not expected to, and is not permitted to, make.⁷

To render a document admissible under this section three conditions are necessary :—

(1) The entry that is relied upon must be one in any public or other official book, register or record ;

(2) it must be an entry stating a fact in issue or a relevant fact ; and,

(3) it must be made by a public servant in the discharge of his official duty, or by any other person in the performance of a duty specially enjoined by the law.⁸

¹ *Ramgobind Prasad v. Gulab Chand Sahu*, (1940) 20 Pat. 273 ; *Dwarka Doss v. Baboo Jankee Doss*, (1855) 6 M. I.A. 88, 98 ; *Lachmi Narain v. Musaddi Lall*, (1941) 17 Luck. 327.

² *Rampyarabai v. Balaji*, (1904) 6 Bom. L. R. 50, 28 Bom. 294.

³ *Hira Bhagar v. Gobind Ram*, (1897) P. R. No. 63 of 1897 (Civil) ; *Abdul Ali v. Puran Mal*, (1914) P. R. No. 82 of 1914 (Civil) ; *Bichha Lal v. Jai Pershad*, (1899) P. R. No. 45 of 1899 (Civil) ; *Gopeswar Sen v. Bejoy*

Chand Mahatab, (1928) 55 Cal. 1167.

⁴ *Maharaj Bhanudas v. Krishnabai*, (1926) 28 Bom. L. R. 1225, 50 Bom. 716.

⁵ *Saraswati Dasi v. Dhanpat Singh*, (1882) 9 Cal. 431.

⁶ *Shoshi Bhooshum Bose v. Girish Chunder Mitter*, (1893) 20 Cal. 940 ; *Rai Dirgaj Deo v. Beni Mahto*, (1917) 20 Bom. L. R. 712, P.C.

⁷ *Ali Nasir Khan v. Manik Chand*, (1902) 25 All. 90, F.B.

⁸ *Samar Dasadh v. Juggul Kishore Singh*, (1895) 23 Cal. 366.

English law.—To render entries in public books or registers admissible, they must have been made promptly or at least without such long delay as to impair their credibility and in the mode required by law. There is no such restriction in this section. Again, English law speaks only of official registers or books.

1. 'Public or other official book, register or record'.—Section 74 specifies what public documents are. Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community.¹ A register of births and deaths kept by village officials under the orders of a Board of Revenue is a public document within the meaning of this section, and an entry in such register recording the death of a person is evidence of the actual date of his death.² A certificate of guardianship is not a public or other official book, register or record within the meaning of this section, and an entry therein relating to the age of the minor is not in itself admissible in evidence to prove the age.³ An entry in a School Admission Register with regard to the age of pupils is admissible in evidence to prove the age of the person concerned.⁴ The Rangoon High Court has held that if the School is not a Government School such entry has but little probative value.⁵ Entry in a municipal register of deaths⁶ or Land Record Register⁷ is admissible. Entries in a village crime note-book are admissible in evidence.⁸ A statement in a decree that a certain pedigree was filed by the parties thereto, and reciting the full pedigree, is admissible.⁹ An Indian Court's written judgment and decree are public records within the meaning of this section.

A map prepared by a person, who is dead, in a previous case not *inter partes*, showing the limits of a particular district is not admissible as it cannot be called a public map offered generally for public sale or made under the authority of Government.¹⁰

The reports of public officials made in the discharge of their official duties are admissible under this section with reference to statements therein of relevant facts or facts in issue. But a distinction has to be made between the statements contained therein relating to relevant facts and the opinions expressed therein as to such relevant facts. So far as mere opinions are concerned while they are admissible the value to be attached is comparatively less. No such broad proposition can be laid down that the report of a public official which has been merely submitted to the higher authorities for the latter's information or guidance and which itself does not

¹ *Ghulam Rasul Khan v. Secretary of State*, (1925) 6 Lah. 269, 52 I. A. 201; *Secretary of State v. Chimanlal Jamnadas*, (1941) 44 Bom. L. R. 295, [1942] Bom. 357; *Barikerao v. Crown*, [1943] Nag. 358.

² *Ramalinga Reddi v. Kotayya*, (1917) 41 Mad. 26.

³ *Said-un-nissa Bibi v. Ruqaiya Bibi*, (1930) 53 All. 428.

⁴ *Manikchand v. Krishna*, (1931) 28 N. L. R. 127.

⁵ *Hook Saing v. Maung E. Hla*, [1940] Ran. 481.

⁶ *Anis-ul-Rehman Khan v. Beni Ram*, (1901) P. R. No. 59 of 1901 (Civil).

⁷ *Po Gaung v. Ma Shwe Bwin*, (1908) 4 L. B. R. 231; *Gangabai v. Fakirgowda*, (1929) 57 I. A. 61, 32 Bom. L. R. 368, 54 Bom. 336.

⁸ *Amdumiyar v. Crown*, [1937] Nag. 315; *Shrikisan v. Jagoba*, [1937] Nag. 382.

⁹ *Collector of Gorakhpur v. Ram Sundar*, (1934) 36 Bom. L. R. 867, 61 I. A. 286, 56 All. 468. *Seethapati Rao Dora v. Venkanna Dora*, (1922) 45 Mad. 332, F.B., not correct in view of this decision.

¹⁰ *Kesho Prasad v. Bhagjogna Kuer*, (1937) 39 Bom. L. R. 731, 16 Pat. 258, P.C.

bear the stamp of finality on it, or a report made in compliance with the order of the higher authorities and submitted to them is not admissible in evidence.¹

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any Provincial Government* as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Relevancy of statements in maps, charts and plans.

COMMENT.—This section mentions two kinds of maps or charts, viz., (1) maps or charts generally offered for public sale; (2) maps or plans made under the authority of Government. The admissibility of the first kind rests upon the ground that they contain the result of inquiries made under competent authority concerning matters in which the public are interested. The publications being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. The admissibility of the second class rests on the ground that, being made and published under the authority of Government, they must be taken to have been made by, and to be the result of, the study or inquiries of competent persons.

To render inquiries, reports, surveys, and other similar documents admissible in evidence as *public documents*, it must appear that they were made that the public might make use of them and be able to refer to them, for the fact that the public are interested in the documents, and are in a position to challenge or dispute them, if inaccurate, invests them with a certain amount of authority.³

Neither this section nor s. 83 has any application to maps prepared for private purposes, that is, for the purpose of any particular suit or by any Government officer for any special purpose. Thus, a map made by a Deputy Collector for the purpose of the settlement of land forming the silted bed of a river is not one which is admissible in evidence under this section and s. 83 of the Act; but it is a map the accuracy of which must be proved before it can be admitted in evidence.³ But maps printed by Government of different wards of a city are admissible in evidence.⁴

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Central Legislature, or of any other legislative authority in all Provinces* constituted by any laws for the time being in force or in a Government notification or notification by the Crown Representative appearing in the Official Gazette, or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty, is a relevant fact.

Relevancy of statement as to fact of public nature contained in certain Acts or notifications.

¹ *Maheshwar Naik v. Tikayet Saitendra, Narayan*, [1949] Cut. 312.

* As amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

² Taylor, 12th edn., s. 1769A, p. 1111; *Rahmat-ulla Khan v. Secretary*

of State for India, (1913) P. R. No. 63 of 1913 (Civil).

³ *Kanto Prashad Hazari v. Jagat Chandra Dutta*, (1895) 23 Cal. 335.

⁴ *Secretary of State v. Chimanlal*, (1941) 44 Bom. L. R. 295.

COMMENT.—Acts of Parliament or of the Central Government or of any local Legislature or notifications of the Government or the Crown Representative are admissible in evidence when the Court has to form an opinion as to the existence of any fact of a public nature contained therein. Under s. 81 the Court “shall presume” the genuineness of these documents. These documents, as well as all others of a public nature are generally admissible in evidence, although their authenticity be not confirmed by the usual test of truth, namely, the swearing, and the cross-examining, of the persons who prepared them.

English law.—Under English law there is a difference as to the effect of a recital in a public Act and in a private Act. This distinction is not recognised in this section.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Relevancy of statements as to any law contained in law-books.

COMMENT.—When it is necessary to form an opinion as to the law of any country, statements of such law in a book published under the authority of Government of that country and reports of cases decided by Courts of that country and contained in books purporting to be reports of such rulings, are relevant, that is, may be referred to by the Court. A statement contained in an unauthorized translation of the Code Napoleon as to what the French law is on a particular matter, is not relevant.¹ Statements in books of law and in law reports are admissible on grounds similar to those stated in ss. 35, 36 and 37. Opinion of an expert on foreign law is received under s. 45.

No Court takes judicial notice of the laws of a foreign country, but they must be proved as facts.

English law.—Under English law, laws of foreign countries can only be proved by calling professional or other official persons to give their opinion on the subject. Such witnesses are allowed to refresh their memory by reference to text-books, decisions, statutes, etc. Under s. 45, opinions of experts may be admitted to prove a point of foreign law.

HOW MUCH OF A STATEMENT IS TO BE PROVED.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers.

¹ *Christien v. Delanney*, (1899) 26 Cal. 931.

COMMENT.—Principle.—When evidence is given of a statement which forms part of (a) a longer statement, or (b) a conversation, or (c) an isolated document, or (d) a document contained in a book, or (e) a series of letters or papers, the Court has discretion as to how much evidence should be given of the statement, conversation, document, book, or series of letters or papers for the full understanding of the nature and effect of the statement and the circumstances under which it was made. The principle on which this section is based is that it would not be just to take part of a conversation, letter, etc., as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he wrote or said on the same occasion.¹ Thus, the rule enacted in this section will not warrant the reading of distinct entries in an account book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on by the opponent.

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT.

40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

Previous judgments relevant to bar a second suit or trial.

COMMENT.—Sections 40 to 43 deal with the subject of relevancy of judgments. Judgments *qua* judgments or adjudications are admissible as *res judicata* under this section or as relating to matters of public nature under s. 42. Judgments other than those mentioned in ss. 40, 41 and 42 may be relevant under s. 43, if their existence is a fact in issue or is relevant under some other provisions.

Principle.—Under this section the existence of a judgment, decree, or order, is a relevant fact, if it by law has the effect of preventing any Court from taking cognizance of a suit, or holding a trial. It is intended to include all cases in which a general law relating to *res judicata inter partes* applies. The main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants. *Res judicata* means, by its very words, a thing upon which the Court has exercised its judicial mind. Section 11 of the Civil Procedure Code lays down the law as to *res judicata*.

This section has nothing to do with questions of evidence beyond the admissibility of the judgments, because a plea of *res judicata* is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure as distinguished from the rules of evidence.² Whether a person ought to be allowed to litigate any particular question and if so by what limitations the right should be restricted, are questions which do not belong, in any proper sense, to the law of evidence, whose province it is simply to provide the means by which parties to suits may prove any right to which the Legislature entitles them. The present section, accordingly, is so worded as to carry out whatever may be for the time the law of procedure on such questions.³

The principle of this section applies to criminal Courts as well. The plea of *autrefois convict* or *autrefois acquit*, that is, of a previous lawful conviction or lawful acquittal, has always been held to be a good plea. See s. 403, Criminal Procedure Code.

¹ *The Queen's Case*, (1820) 2 Br. & B. 284, 302.

Palakdhari Singh, (1889) 12 All. 1, 44, F.B.

² *The Collector of Gorakhpur v.*

³ *Cunningham*, p. 174.

The judgment of a criminal Court that a person did or did not commit an offence, does not operate as *res judicata* to prevent a civil Court from determining such questions for purposes of a suit.¹ Similarly, the judgment of a civil Court is not admissible in a criminal prosecution to prove the innocence of the accused.² In a criminal trial, it is for the Court to determine the question of the guilt of the accused and it must do this upon the evidence before it, independently of decisions in civil litigation between the same parties. A judgment or decree is not admissible in evidence in all cases as a matter of course and, generally speaking, a judgment is only admissible to show its date and legal consequences.³ A judgment of a civil Court other than one *in rem* cannot finally decide a matter subsequently dealt with in a criminal Court even though the facts in dispute in the civil suit govern the only question that can arise in the criminal proceedings.⁴ To hold that when a party has been able to satisfy a Civil Court as to the justice of his claim and has in the result succeeded in obtaining a decree which is final and binding upon the parties, it would not be open to Criminal Courts to go behind the findings of the Civil Courts is to place the Civil Court without any valid reason in a much higher position than what it actually occupies in the system of administration in this country and to make it master not only of cases which it is called upon to adjudicate but also of cases which it is not called upon to determine and over which it has really no control.⁵

41. A final judgment, order or decree of a competent Court,¹ in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which

Relevancy of certain judgments in probate, etc., jurisdiction.

declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. (1)

Such judgment, order or decree is conclusive proof— (2)

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation ;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person ;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease ;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

¹ *Ram Lal v. Tula Ram*, (1881) 4 All. 97. See *Bishen Das v. Ram Lal-bhaya*, (1915) P. R. No. 106 of 1915 (Civil).

² *Ramanamma v. Appalanarasayya*, (1931) 55 Mad. 346. In Bombay a judgment of a civil Court dismissing a suit to recover moneys was held relevant in a prosecution for criminal

breach of trust for some of the items covered by the civil suit : *Markur*, (1914) 41 Bom. 1, 18 Bom. L. R. 185.

³ *Trailokyanath Das v. Emperor*, (1931) 59 Cal. 186.

⁴ *Maung Po Nwe v. Ma Pwa Chone*, [1940] Ran. 163.

⁵ *B. N. Kashyap v. The Crown*, [1944] Lah. 408, F.B.

COMMENT.—This section consists of two parts. The first part makes the final judgment, order or decree of a competent Court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction relevant: the second part makes the judgments conclusive proof in certain matters.

The section deals with what are usually called judgments *in rem*, i.e. judgments which are conclusive not only against the parties to them but also against all the world. "A judgment *in rem* has been defined to be 'an adjudication pronounced, as its name indeed denotes, upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose'".¹ "This rule appears to rest, partly, upon the ground that.... every one who can possibly be affected by the decision is entitled, if he think fit, to appear and assert his own rights, by becoming an actual party to the proceedings; partly, upon the ground that judgments *in rem* not merely declare the *status* of the subject-matter adjudicated upon, but, *ipso facto*, render it such as they declare it to be; and, partly, if not principally, upon the broad ground of public policy, it being essential to the peace of society, that the social relations of every member of the community should not be left doubtful, but that, after having been clearly defined by one solemn adjudication, they should conclusively be set at rest."² A judgment *in rem* can only be impeached if it can be shown—

- (1) that the Court had no jurisdiction; or
- (2) that the judgment was obtained by fraud or collusion; or
- (3) that it was not given on the merits; or
- (4) that it was not final, e.g., interlocutory.

There is no distinction between a judgment *in rem* and a judgment *in personam*, excepting that in the one the point adjudicated upon, which is always as to the status of the *res*, is conclusive against all the world as to that status, whereas in the other the point is only conclusive between parties and privies. The term 'privy' means a partaker who is not a party.³ A judgment *in personam* is the ordinary judgment between parties in cases of contract, tort, or crime. It is no proof of the truth either of the decision or of its grounds as between strangers, or a party and a stranger.

A judgment *in rem* is conclusive only as regards status but not as regards the ground on which it is based.⁴

Under this section a judgment, order or decree, given by a competent Court in the exercise of (1) probate, (2) matrimonial, (3) admiralty, or (4) insolvency jurisdiction, will be conclusive proof as to the legal character conferred on, or taken away from, any person or to which any person is declared to be entitled.

1. 'Competent Court'.—The word 'Court' is not limited to Courts in British India. The expression 'competent Court' means the Court of any country which is competent to pass such judgment as is referred to in this section, that is to say, a judgment *in rem*.⁵ No Court can pronounce a judgment *in rem* binding outside the State in which the Court exercises jurisdiction unless such judgment affects either a thing situate, or a person domiciled, within such State. Thus a judgment of the Supreme Court of His Britannic Majesty at Alexandria as to the validity or otherwise of a will made by a person domiciled at Aden is binding on the parties so far as the properties in Egypt are concerned; but it has no effect as a

¹ Taylor, 12th edn., s. 1674, p. 1050.

² *Ibid.*, s. 1676, p. 1054.

³ *Ahsan Hussain v. Maina*, [1938] Nag. 431.

⁴ *D. G. Sahasrabudhe v. Kilachand Deochand & Co.*, [1947] Nag. 85.

⁵ *Messa v. Messa*, (1938) 40 Bom. L. R. 571, [1938] Bom. 529.

judgment *in rem* in respect of assets outside Egypt.¹

(1) **Probate jurisdiction.**—The grant of probate under the Indian Succession Act (XXXIX of 1925) is conclusive proof of the title of executors and of the genuineness of the will admitted to probate. The conclusiveness of the probate rests upon the declared will of the Legislature as expressed in ss. 227 and 273 of the Indian Succession Act, 1925. The grant of probate is the method which the law specially provides for establishing a will.

The section is not applicable to the judgment of the Probate Court refusing probate.² A judgment of a Court of Probate is conclusive proof that the person to whom letters or probate have been granted has been clothed with the powers and the responsibilities of the deceased and of nothing else, and a question of status decided by a Court of Probate can be raised again.³

(2) **Matrimonial jurisdiction.**—This jurisdiction is conferred on Courts by the following Acts :—

(a) The Indian Divorce Act (IV of 1869) relating to the divorce of persons professing the Christian religion.

(b) The Parsi Marriage and Divorce Act (III of 1936) relating to marriage and divorce among the Parsis.

(c) The Native Converts' Marriage Dissolution Act (XXI of 1866).

(d) The Indian Christian Marriage Act (XV of 1872).

(e) Act relating to marriage between persons not professing the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religion (Act III of 1872).

A judgment of a Matrimonial Court decreeing divorce or nullity of marriage is binding as to the status of the parties concerned. It is conclusive upon all persons that the parties have been divorced and that they are no longer husband and wife. But a judgment in a suit for restitution of conjugal rights is purely a private suit between two persons, and such a judgment is not a judgment *in rem* within the meaning of this section.⁴

(3) **Admiralty jurisdiction.**—Admiralty jurisdiction is conferred on several High Courts by Letters Patent. It is also conferred on mofussil Courts by 12 & 13 Vic. c. 88. The decision of a Prize Court is conclusive upon all the world. A judgment delivered in an ordinary suit in an Admiralty Court is not a judgment *in rem* binding strangers.

(4) **Insolvency jurisdiction.**—The jurisdiction is conferred on the High Courts by the Presidency-towns Insolvency Act (III of 1909) and on mofussil Courts by the Provincial Insolvency Act (V of 1920). Orders passed in insolvency bind strangers as well.

A creditor who has unsuccessfully opposed his debtors' application in the Bombay High Court to be declared an insolvent, on the ground, *inter alia*, that he had made fraudulent transfers of property, is bound by the decision of that Court and cannot in a subsequent suit filed in the Punjab raise the plea that the transfer of the property was fraudulent and void, notwithstanding that the property concerned is situate in that province.⁵

¹ *Messa v. Messa*, (1938) 40 Bom. L. R. 571, [1938] Bom. 529.

² *Kalyanchand v. Silabai*, (1913) 16 Bom. L. R. 5, 38 Bom. 309, F.B.

³ *Mi Ngwe Zan v. Mi Shwe Taik*, (1910) 1 U. B. R. (1910-13) 61, 63;

L. E.—8.

Mali Muthu Servay v. King-Emperor, (1926) 4 Ran. 251.

⁴ *Ma Po Khin v. Ma Shin*, (1933) 11 Ran. 198.

⁵ *Ram Narain v. Durga Dat*, (1912) P. R. No. 55 of 1912 (Civil).

The Madras High Court has in a full bench case held that the judgment of a Court exercising insolvency jurisdiction, admitting proof of an alleged debt of a creditor and declaring him to be a creditor in the insolvency, is not a judgment *in rem* since it neither confers upon nor takes away from him any 'legal character,' nor declares him 'to be entitled to any specific thing, not as against any specified person but absolutely,' within the meaning of this section.¹

CASES.—The executors named in a will, executed in the mofussil, applied for probate of the will. The Court refused probate on the ground that the testator was not at the time of a sound disposing mind. The testator's widow filed a regular suit against the defendants, as executors *de son tort*, to recover possession of the testator's property. The defendants again set up the will and claimed to be invested under it with all the legal character of executors. It was held that this section was not applicable to the judgment of the Probate Court, for the finding of the Court that an attempted proof had failed was not a judgment such as was contemplated in this section. The only kind of negative judgment which was contemplated was that which expressly took away from a person the legal character which had up to that time subsisted.²

Judgment based on compromise.—A previous judgment passed on a compromise is not a judgment *in rem* within the meaning of this section and is therefore no bar to a subsequent suit.³

42. Judgments, orders or decrees other than those mentioned in section 41 are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.

ILLUSTRATION.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

COMMENT.—**Principle.**—Under this section judgments relating to matters of a public nature are declared relevant, whether between the same parties or not. It also forms an exception to the general rule that no one shall be affected or prejudiced by judgments to which he is not a party or privy. The exception just stated is allowed in favour of verdicts, judgments, and other adjudications upon subjects of a *public nature*, such as customs, prescriptions, tolls, boundaries between parishes, counties, or manors, rights of ferry, liabilities to repair roads, or sea-walls, moduses, and the like. In all cases of this nature, as evidence of reputation will be admissible, adjudications—which for this purpose are regarded as a species of reputation—will also be received, and this, too, whether the parties in the second suit be those who litigated the first, or be utter strangers. The effect, however, of the adjudication, when admitted, will so far vary that, if the parties be the same in both suits, they will be bound by the previous judgment but, if the litigants in the second suit be strangers to the parties in the first, the judgment, though admis-

¹ *An Advocate*, (1931) 54 Mad. 601, F.B.

² *Kalyanchand v. Sitabai*, (1913) 16 Bom. L. R. 5, 38 Bom. 309, F.B.

³ *Rahmat Ali Khan (Pir) v. Mus-sammatt Babu Zukra*, (1911) P. R. No. 14 of 1912 (Civil).

sible, will not be conclusive.¹ Under this section the decrees of competent Courts are good evidence in matters of public interest, such as the existence of a custom of succession in a particular community,² or of a custom under which a tenure is held.³ A judgment in a criminal case is not a matter of a public nature and is not admissible in evidence in civil proceedings under this section.⁴ A coroner's inquisition is not relevant under any of the provisions of this Act, and is therefore inadmissible in evidence. It is not a judgment, nor can it be treated as an opinion.⁵

Section 40 admits as evidence all judgments *inter partes* which would operate as *res judicata* in a second suit. Section 41 admits judgments *in rem* as evidence in all subsequent suits where the existence of the right is in issue, whether between the same parties or not. And this section admits all judgments not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of public nature relevant to the enquiry.⁶

Whether judgments, orders or decrees, of a Court are transactions within the meaning of s. 13 has been much disputed. A Court's adjudication is obviously not a transaction, and that part of the written judgment which describes the litigation may be admissible to prove the transaction under s. 35.

43. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act.

Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.

ILLUSTRATIONS.

(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him. B is convicted.

A afterwards sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.

¹ Taylor, 12th Edn., s. 1683, p. 1058.

² *Bai Baiji v. Bai Santok*, (1894) 20 Bom. 53.

³ *Dalglis v. Guzuffer Hassain*, (1896) 23 Cal. 427.

⁴ *Bishen Das v. Ram Labhaya*,

(1915) P. R. No. 106 of 1915 (Civil).

⁵ *Emperor v. Bhagwandas Tulsidas* (No. 2), (1945) 47 Bom. L. R. 997.

⁶ *Gujju Lall v. Fatteh Lall*, (1880) 6 Cal. 171, F.B.

COMMENT.—Principle.—The section declares that judgments, orders and decrees, other than those mentioned in ss. 40, 41 and 42, are of themselves irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those recited sections, *qua* judgments, orders and decrees, but it must not be taken to make them absolutely inadmissible when they are the best evidence of something that may be proved *aliunde*.¹ A judgment is generally speaking admissible to show its date and its legal consequences.² So far as regards the truth of the matter decided, a judgment is not admissible evidence against one who is a stranger to the suit.³

To have the effect of *res judicata*, a judgment *inter partes* alone can be admitted in evidence, but for other purposes where judgments are sought to be used to show the conduct of the parties, or show particular instances of the exercise of a right, or admissions made by ancestors, or how the property was dealt with previously, they may be used under s. 11 or 13 as exceptions recognised under this section, as relevant evidence. That is to say, their existence, though not their correctness, might be proved. Except where they are judgments *in rem*, or where they relate to public matters, judgments not *inter partes* have been always held to be not *res judicata*, but they cannot be wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property.⁴

Scope.—This section expressly contemplates cases in which judgments would be admissible under other sections of the Act, which are not admissible under s. 40 41 or 42. The cases contemplated by this section are those where a judgment is used not as *res judicata*, or as evidence more or less binding upon an opponent by reason of the adjudication which it contains. But the cases referred to in this section are such as the section itself illustrates, viz., when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This would be one of the many cases alluded to in this section.⁵

Judgments admissible only under this section and s. 13 must be restricted to proving the transaction or the instance meant by the section.⁶ A judgment not *inter partes* holding that a partition of a certain estate was proved is only admissible under the provisions of sections 13 and 43 of the Evidence Act as establishing a particular transaction in which the partibility of the estate was asserted and recognised.⁷

Admissibility of judgments in civil and criminal matters.—A judgment in a criminal case cannot be received in a civil action to establish the truth of the facts upon which it is rendered, and a judgment in a civil action cannot be given

¹ *The Collector of Gorakhpur v. Palakdhari Singh*, (1889) 12 All. 1, F.B.

² *Trailokyanath Das v. Emperor*, (1931) 59 Cal. 136; *Raghunath Singh v. King-Emperor*, (1935) 15 Pat. 336.

³ *The Natal Land & Company v. Good*, (1868) L. R. 2 P. C. 121, 133; *Maroti v. Jagannathdas*, [1940] Nag. 699.

⁴ *Lakshman v. Amrit*, (1900) 24 Bom. 591, 598, 599, 2 Bom. L. R. 336.

⁵ *Gujju Lall v. Fateh Lall*, (1880) 6 Cal. 171, 192, F.B. See *Secretary of State v. Syed Ahmad Badsha*, (1921) 44 Mad. 778, F.B.; *Indar Singh v. Fateh Singh*, (1920) 1 Lah. 540.

⁶ *Mahamad v. Husan*, (1906) 9 Bom. L. R. 65, 31 Bom. 143.

⁷ *Shamdas v. Gurmukhsingh*, [1945] Kar. 40.

in evidence for such a purpose in a criminal prosecution.¹ Technically, it is inadmissible as it is not between the same parties, the parties in the prosecution being the King-Emperor on the one hand, and the accused on the other, and in the civil suit the accused and some third party; but the substantial ground is that the issues in a civil and criminal proceeding are not identical and the burden of proof rests in each case on different shoulders.²

1. 'Or is relevant under some other provisions of this Act'.—These words clearly show that there are other provisions in this Act, under which the existence of judgments not *inter partes* are relevant; for instance, under ss. 8, 11, 13, 14 and s. 54, Explanation (2), judgments not *inter partes* are relevant.³ Illustrations (d), (e) and (f) explain the meaning of the last words of this section and are examples of judgments being relevant otherwise than under ss. 40, 41 and 42.

A judgment not *inter partes* is admissible in evidence, *quantum valeat*, if its existence is a relevant fact.⁴

CASE.—In deciding a suit for damages arising from a malicious prosecution, the Judge treated the judgment of the Magistrate and evidence given before the Magistrate, in the prosecution complained of, as evidence in the case. And looking at the judgment of the Magistrate as being a record of the facts found, the Judge came to the conclusion that the plaintiff was not present at the time when the alleged offence was committed; and decreed the plaintiff's claim. It was held that it was not permissible to the Judge to utilize the judgment of the Magistrate in the way he did; and that this section or s. 13 or s. 11 did not apply to the case.⁵

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party,¹ was delivered by a Court not competent to deliver it,² or was obtained by fraud or collusion.³

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

COMMENT.—Principle.—A party to a suit or other proceeding may show that a judgment, order, or decree, which is relevant under s. 40, that is, which would, as a judgment *inter partes*, operate as *res judicata*, or which is relevant under s. 41, that is, which is evidence as a judgment *in rem*, or which is relevant under s. 42, that is, which is evidence as a judgment relating to a public matter, and which is proved by the adverse party, was passed by a Court, which had no jurisdiction to pass it or was obtained by fraud or collusion.⁶ It is not necessary for the party against whom such judgment, order or decree is sought to be used to bring a separate suit to have it set aside, but it is open to such party in the same suit in which such judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.⁷

¹ *Raj Kumari Debi v. Bama Sundari Debi*, (1896) 23 Cal. 610, 613; *Ram Lal v. Tula Ram*, (1881) 4 All. 97.

² *Gogun Chunder Ghose v. The Empress*, (1880) 6 Cal. 247, 248.

³ See *Wazir v. Queen-Empress*, (1895) P. R. No. 7 of 1895 (Cr.).

⁴ *Babui Shamsunder Kuer v. Ram-khelawan Sah*, (1929) 8 Pat. 783.

⁵ *Gulabchand v. Chunilal*, (1907) 9 Bom. L. R. 1134.

⁶ *Rajib Panda v. Lakhan Sindh Mahapatra*, (1899) 27 Cal. 11, 20.

⁷ *Bansi Lal v. Dhapo*, (1902) 24 All. 242; *Rajib Panda v. Lakhan Sindh Mahapatra*, (1899) 27 Cal. 11, 20; *Bhagwandas Narandas v. Patel & Co.*, (1939) 42 Bom. L. R. 231, [1941] Bom. 403.

The section lays down not only a rule of law relating to evidence, but also a rule of procedure. There are many sections of this Act, such as ss. 66-73, 130, 135, 136 and 150, which relate more or less to matters of procedure.

The right of a party to set aside by a suit a judgment or decree on the ground of fraud, exists independently of the provisions of this Act.¹

The Allahabad High Court has held that this section does not prevent a minor from adducing evidence of negligence of his guardian, if he has a substantive right to prove such negligence and thereby to avoid the judgment. It does not enumerate and exhaust the grounds upon which a decree or order may be attacked.² Similarly, the Calcutta High Court has held that a decree against a minor can be set aside in a subsequent suit by him if the decree was passed against the minor as a result of gross and culpable negligence of the next friend or guardian-*ad-litem*.³ The Madras⁴ and the Patna⁵ High Courts are of the same view. A full bench of the Bombay High Court has held that gross negligence, apart from fraud or collusion, on the part of the next friend or guardian-*ad-litem*, does not afford the basis of a suit to set aside a decree obtained against a minor.⁶

English law.—In England a party to a suit would not be allowed to defeat a judgment by showing that, in obtaining it, he had practised an imposition upon the Court. Under this Act, however, there is no such restriction. This section permits any party to a suit or other proceeding to show that a judgment was obtained by fraud or collusion. The words “any party to a suit or other proceeding” are wide enough to include both the innocent and the guilty party to the first suit.

1. ‘Which has been proved by the adverse party’.—The judgment or decree which the section allows a party to impeach on the ground of fraud must be one which has been proved by the adverse party.

2. ‘Delivered by a Court not competent to deliver it’.—Every species of judgment will be rendered inadmissible in evidence on proof given that the Court which pronounced it has no jurisdiction.

The “competency” of a Court and its “jurisdiction” are synonymous terms. They mean the right of a Court to adjudicate in a given matter. They do not mean, in a case where that right exists, the coming to a correct conclusion upon any question of law or fact arising in that matter.⁷ The words “not competent” refer to a Court acting without jurisdiction.⁸ Either party or a stranger against whom a previous judgment is used in a subsequent suit may impeach it on the ground of want of jurisdiction.

3 ‘Obtained by fraud or collusion’.—This section allows a party to prove fraud or collusion in order to avoid a judgment or order.⁹ The section is not applicable in cases of gross negligence.¹⁰ The fraud contemplated in this section

¹ *Venkatappa Naick v. Subba Naick*, (1905) 29 Mad. 179.

² *Siraj Fatma v. Mahmud Ali*, (1932) 54 All. 646, F.B.

³ *Mahesh Chandra Bajan v. Manindra Nath Das*, [1941] 1 Cal. 477.

⁴ *Punnayyah v. Viranna*, (1921) 45 Mad. 425.

⁵ *Kumar Ganganand Singh v. Maharaja Sir Rameshwar Singh Bahadur*, (1927) 6 Pat. 388; *Mathura Singh v. Ram Rudra Prasad Sinha*, (1935) 14 Pat. 824.

⁶ *Krishnadas Padmanabhrao v. Vithoba Annappa*, [1939] Bom. 340, (1938) 41 Bom. L. R. 59, F.B.

⁷ *Sardarmal v. Aramrayal Sabhapathy*, (1896) 21 Bom. 205.

⁸ *Keltilamma v. Kelappan*, (1887) 12 Mad. 228.

⁹ *Siraj Fatma v. Mahmud Ali*, (1932) 54 All. 646, F.B.

¹⁰ *Venkata Seshayya v. Kotiswara Rao*, (1936) 39 Bom. L. R. 317, 64 I. A. 17, [1937] Mad. 263.

must be a fraud practised on the Court itself. 'Fraud' is an extremely collateral act which vitiates the most solemn proceedings of Courts of Justice.¹ The term 'fraud' is defined in s. 17 of the Indian Contract Act. There must be actual or positive fraud, that is, there must be an intention to cheat or deceive another person to his injury.

'Collusion' means an agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose. It may be of two kinds: (1) when the facts put forward as the foundation of the sentence of the Court do not exist; (2) when they exist, but have been corruptly preconceived for the express purpose of obtaining the sentence.²

A judgment or decree obtained by fraud upon a Court does not bind such Court or any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding.³ In applying this rule it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of Judicature in the realm; in all cases it is alike competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.⁴ A Court of inferior jurisdiction is competent to declare a decree of a superior Court to be a nullity on the ground of fraud, if otherwise it has jurisdiction to entertain the suit.⁵

It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud.⁶ "The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of Justice in a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed, but I am not aware that it has ever been suggested in any decided case; and in my opinion it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a rehearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which relates to *res judicata* as well".⁷

A distinction exists between those cases in which the fraud is only attempted but not carried into effect and those in which it has actually been carried into effect. In the former case a party attempting to commit fraud is not precluded from maintaining an action to set aside the fraudulent transaction; but in the latter case he

¹ *Meadows v. Duchess of Kingston*, (1775) 2 Amb. 756.

² Wharton, 14th Edn., p. 212.

³ *The Queen v. Saddler's Company*, (1868) 10 H. L. C. 404, 431.

⁴ *Nistarini Dassi v. Nundo Lall Bose*, (1899) 26 Cal. 891, 908.

⁵ *Sarihakram Maiti v. Nundo Ram*

Maiti, (1906) 11 C. W. N. 579.

⁶ *Paranjpe v. Kanade*, (1882) 6 Bom. 148, 150; *Bhikaji v. Balvant*, (1927) 29 Bom. L. R. 1046.

⁷ Per Petheram, C.J., in *Mahomed Golab v. Mahomed Sulkiman*, (1894) 21 Cal. 612, 619.

is not allowed to take advantage of his own wrong and is precluded from maintaining an action to set aside the fraudulent transaction actually carried into effect.¹

Where both parties to a suit practise fraud on Court and obtain a collusive decree, it is not open to either of them to impeach the judgment of the Court on the ground that it was collusively procured.²

OPINIONS OF THIRD PERSONS WHEN RELEVANT.

45. When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law,¹ science or art,² or in questions as to identity of handwriting³ or finger impressions are relevant facts.

Such persons are called experts.

ILLUSTRATIONS.

(a) The question is, whether the death of A was caused by poison.

The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

COMMENT.—This section is an exception to the rule as regards the exclusion of opinion evidence. Opinions of experts are relevant upon a point of (a) foreign law, (b) science, (c) art, (d) identity of handwriting, and (e) finger impressions.

Principle.—It is “a general rule that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. In other words, this is so when it so far partakes of the character of a science or art as to require a course of previous habit or study to obtain a competent knowledge of its nature”.³ The opinions of skilled witnesses cannot be received when the inquiry relates to a subject which does not require any peculiar habits or course of study to qualify a man to understand it,⁴ e.g.

¹ See *Goberdhan Singh v. Ritu Roy*, (1896) 23 Cal. 902; *Banka Behary Dass v. Raj Kumar Dass*, (1899) 27 Cal. 231; *Govinda Kuar v. Lala Kishun Prosad*, (1900) 28 Cal. 370; *Honapa v. Narsapa*, (1898) 23 Bom. 406; *Sham Lal Mitra v. Amarendra Nath Bose*,

(1895) 23 Cal. 460.

² *Shripad Gauda Venkan Gouda v. Govind Gouda Narayan Gouda*, (1940) 42 Bom. L. R. 1185, [1941] Bom. 160.

³ Taylor, 12th Edn., s. 1418, p. 902.

⁴ *Ibid.*, s. 1419, p. 902.

similarity of fraudulent trademark.¹

An 'expert' witness is one who has devoted time and study to a special branch of learning, and thus is specially skilled on those points on which he is asked to state his opinion. His evidence on such points is admissible to enable the tribunal to come to a satisfactory conclusion.² The opinion of an expert must be given orally and a mere report or certificate by him is not evidence.³ All persons who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required. It is the duty of the Judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert. The Court is bound to defer to the opinion of an expert where skill and experience alone render a person a competent judge. In the case of an expert witness there exists the tendency to support the view which is favourable to the side which employs him so that it is difficult to get from him an independent opinion.

The evidence of an expert does not require to be corroborated before it can be acted upon. The question as to how much reliance a Court would be entitled to place on a witness depends on the facts and the circumstances of that particular case.⁴

1. 'Foreign law'.—Foreign law is law which is not in force in British India. Expert evidence cannot be admitted where a particular law is the law of the land. "The Shiah law on marriage is the law of the land and is in force in British India. It can by no means be called foreign law, nor is such law a science or art within the meaning of that section [s. 45]. It is the duty of Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of witnesses howsoever learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are, therefore, allowed to be admitted".⁵

2. 'Science or art'.—These words include all subjects on which a course of special study or experience is necessary to the formation of an opinion.⁶ "Art, in its legal significance, embraces every operation of human intelligence, whereby something is produced outside of nature; and the term 'science' includes all human knowledge which has been generalised and systematised, and has obtained method, relations and the forms of law".⁷

The study of certain customs and manners of tribes and castes of the areas occupied by them and of other connected matters comes within the meaning of "science or art" in this section. The words "science or art" are to be broadly construed, the term "science" not being limited to the higher sciences and the term "art" not being limited to fine art but having its original sense of handicraft, trade, profession and skill in work, which, with the advance of culture, has been carried beyond the sphere of common pursuits of life into that of "artistic" and "scientific action." The tests which may be applied in determining whether a particular question is one of scientific nature and consequently whether skilled witnesses may pass their opinions upon it are: Is the subject matter of enquiry such that inexperienced men are unlikely to

¹ *Swadeshi Mills Company, Limited* 305.

v. Juggi Lal, Kamlat Cotton Mills Company, Limited, (1926) 49 All. 92.

² Powell, 10th Edn., 39.

³ *Perumal Mudaliar v. South Indian Railway Co., Ltd.*, [1937] Mad. 764.

⁴ *Ladharam v. Crown*, [1944] Kar.

⁵ *Aziz Bano v. Muhammad Ibrahim Husain*, (1925) 47 All. 823, 835.

⁶ Stephen's Dig., 12th Edn. (1946), Art. 49.

⁷ Per Davis, J., in *Atchison etc. R. R. Co. v. W. S.*, 15 Ct. of Claims, 140.

prove capable of forming a correct judgment upon it without the assistance of experts; that is, does it so far partake of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature. Books dealing with customs and manners of different castes and tribes are admissible in evidence to prove them.¹

Where experts are called to pronounce their opinions on scientific questions, they may refresh their memory by referring to professional treatises.

Finger-prints.—The reason as well as opinion given by a finger-print expert as to the identity of a palm impression are admissible in evidence.² The evidence given by a finger-print expert need not necessarily be corroborated; but the Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of other evidence.³

Foot-prints.—Though the science of foot-prints has not progressed very far, evidence of similarity of the impressions of the foot, shod or unshod, is admitted as circumstantial evidence.⁴

Age.—A doctor's opinion as to age of a person based on his or her height, weight and teeth, does not amount to legal proof of the age of that person.⁵

3. **'Handwriting'.**—It is necessary for the admission of the evidence of a handwriting expert, that the writing with which the comparison is made should be admitted or proved beyond doubt to be that of the person alleged, and that the comparison should be made in open Court in the presence of such person.⁶ The opinion of an expert that certain documents have been typewritten on the same machine is not admissible under this section which, as it stands, does not cover such expert opinion. The Court may ask the witness to explain points in favour of his view, but must come to its own conclusion and not treat such opinion as expert opinion relevant by itself.⁷

If cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document, but, if the paper be used to refresh the memory of the witness, or if any questions be put respecting its contents, or as to the handwriting in which it is written, a sight of the document may then be demanded by the opposite counsel.⁸

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Facts bearing upon
opinions of experts.

ILLUSTRATIONS.

(a) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

¹ *Mahadeo v. Vyankammabai*, [1947] Nag. 781.

² *Emperor v. Babulal Behari*, (1928) 30 Bom. L. R. 321, 52 Bom. 223.

³ *Emperor v. Fakir Mahomed*, (1935) 38 Bom. L. R. 160, 60 Bom. 187, differing from *Jassu Ram v. The Crown*, (1923) 4 Lah. 246.

⁴ *Mylswami, In re*, [1938] Mad. 262;

Sidik v. Crown, [1941] Kar. 525.

⁵ *Emperor v. Qudrat*, [1939] All. 871.

⁶ *Suresh Chandra Sanyal v. Emperor*, (1912) 39 Cal. 606.

⁷ *Emperor v. Jhabwala*, (1933) 55 All. 1040.

⁸ Taylor, 12th Edn., s. 1452, p. 925; *Jarat Kumari Dassi v. Bissessur Dutt*, (1911) 39 Cal. 245.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

COMMENT.—Principle.—The opinion of an expert is open to corroboration or rebuttal. The illustrations indicate that for this purpose *res inter alios acta* is receivable.

An exception to the general rule, which lays down that evidence of collateral facts cannot be received, arises “where the question is a *matter of science*, and where the facts proved, though not directly in issue, tend to illustrate the opinions of scientific witnesses. Thus, where the point in dispute was, whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time as the harbour in question, was admitted, as such evidence served to elucidate the reasoning of the skilled witnesses.¹

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Opinion as to handwriting when relevant.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually¹ submitted to him.

ILLUSTRATION.

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C or D ever saw A write.

COMMENT.—Principle.—When the Court has to form an opinion as to the handwriting of any person, the opinion of the person acquainted with the handwriting of such person is admissible in evidence. This section indicates one of the methods of proving handwriting. The handwriting of a person may be proved in the following ways:—

(1) By the evidence of the writer himself.

¹ Taylor, 12th Edn., s. 337, p. 234; *Folkes v. Chadd*, (1782) 3 Doug. 157.

(2) By the evidence of a person who has seen the person, whose handwriting is in question, write.¹

(3) By the evidence of a person acquainted with such handwriting either by receiving letters purporting to be written by the person in answer to documents written by the witness or under his authority and addressed to that person or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

(4) By the evidence of an expert in comparing the handwriting.

(5) By the Court comparing the document in question with any others proved to the satisfaction of the Court to be genuine.

(6) The Court may also direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words alleged to have been written by such person.

A witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands. It is within the power of the presiding Judge and often may be desirable to permit the opposing advocate to intervene and cross-examine so that the Court may at that stage be in a position to come to a definite conclusion on adequate materials as to the proof of the handwriting.²

A document wholly in the handwriting of a party is said to be an autograph or holograph; where it is in the handwriting of another person, and is only signed by the party, the signature may be called "onomastic"; where it is signed by a cross or other symbol, "symbolic".³

1. 'Habitually'.—This word means 'usually', 'generally', or 'according to custom'. It does not refer to the frequency of the occasions but rather to the invariability of the practice. A record-keeper, who in the course of his official duty has to file papers sent to him, is competent to testify to the handwriting of a person whose papers are so filed, though the number of such papers may not be numerically great.⁴

48. When the Court has to form an opinion as to the existence of any general custom¹ or right, the opinions, as to the

Opinion as to existence of right or custom, when relevant.

existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

ILLUSTRATION.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

COMMENT.—**Principle.**—Opinions of persons who are in a position to know of the existence of a custom or usage in their locality are admissible. For example, a person, who had been in the habit of writing out deeds of sale, or one who had been seeing transfers frequently made, would certainly be in a position to give his

¹ *In the matter of a First Grade Pleader*, (1914) P. R. No. 18 of 1915 (Civil).

² *Shankar v. Ramji*, (1903) 5 Bom.

L. R. 663, 28 Bom. 58.

³ Best, 12th Edn., s. 232.

⁴ *Emperor v. Ponde* (No. 2), (1925) 27 Bom. L. R. 1031.

opinion whether there was a custom or usage in that particular locality, and the opinion of such persons would be admissible.¹

This section read with s. 60 requires that the person who holds the opinion should be called as a witness.²

The section deals with oral evidence given in Court by the person expressing the opinion. Section 13 applies to all rights and customs, public or private, and refers to specified facts which may be given in evidence. Under s. 32, cl. (4), opinion as to public right or custom of a person, who is dead or who has become incapable of giving evidence, or whose attendance cannot be procured without unreasonable delay or expense, is admissible. The statements made by deceased persons after the controversy had arisen, and therefore inadmissible under s. 32, are not admissible under this section and s. 40. They cannot be admitted under cl. (7) of s. 32 either.³

1. 'Custom'.—As to 'custom', see Comment on s. 13. 'Custom' is an un-written law established by usage. 'Custom' should be distinguished from 'usage.' 'Usage' is a fact and 'custom' is a law. There can be usage without custom, but not custom without usage.

A custom could properly be proved by general evidence given by members of the family or tribe without proof of special instances.⁴ Judicial decisions recognising customs are relevant evidence.⁵ When a custom has been repeatedly brought to the notice of the Courts and has been recognised by them regularly in a series of cases, it attains the force of law.⁶

Explanation.—The Explanation indicates that private rights are excluded from the operation of the section. Such rights must be proved by facts such as acts of ownership. The word 'general' is an equivalent of the term 'public'.

Opinion as to usages,
tenets, etc., when
relevant.

49. When the Court has to form an opinion

as to—

the usages¹ and tenets² of any body of men or family,
the constitution and government of any religious or charitable
foundation, or
the meaning of words or terms used in particular districts or by
particular classes of people,
the opinions of persons having special means of knowledge³ thereon,
are relevant facts.

COMMENT.—The opinions of persons who have special means of knowledge as to (a) usages, (b) tenets, of any body of men or family, (c) constitution of any religious foundation, (d) meanings of words or terms used in a district, are admissible in evidence. "Such persons are, so to speak, the depositaries of customary law, just as the text books are the depositaries of the general law".⁷

This section must be read with s. 51.

¹ *Sariatullah Sarkar v. Pran Nath Nandi*, (1898) 26 Cal. 184.

² *Amina Khatun, Musammat v. Khalil-ur-Rahman Khan*, (1933) 8 Luck. 445.

³ *Amina Khatun, Musammat v. Khalil-ur-Rahman Khan*, (1933) 8 Luck. 445.

⁴ *Ahmad Khan v. Channi Bibi*, (1925) 52 I.A. 379, 6 Lah. 502. See

Rahimatbai v. Hirbai, (1877) 3 Bom. 34.

⁵ *Tulshiram v. Chunnimal*, [1940] Nag. 149.

⁶ *Suganchand Bhikamchand v. Mangibai Gulabchand*, (1941) 44 Bom. L. R. 358, [1942] Bom. 473.

⁷ *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy*, (1886) 10 Bom. 528, 513.

1. 'Usages'.—These will include usages of the trade and agriculture; mercantile usage and any usage common to a body of men or family. Usages of a family will include, for instance, the custom of primogeniture, any peculiar course of descent.

2. 'Tenets'.—This will include any opinion, principle, dogma, or doctrine which is held or maintained by a body of men. It will apply to religion, politics, science, etc.

3. 'Special means of knowledge'.—All that is meant by this expression is that the person must have had opportunities for acquiring knowledge of a usage or custom and that he had acquired the necessary knowledge.

Evidence relating to works that are technical are also admissible under this section.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section 494, 495, 497, or 498 of the Indian Penal Code.

ILLUSTRATIONS.

(a) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B.

The fact that A was always treated as such by members of the family, is relevant.

COMMENT.—When the Court has to ascertain the relationship of one person to another, the opinion of any person having special means of knowledge, as expressed by conduct, is admissible in evidence. The opinion may be of a member of the family or an outsider, but he must have special means of knowledge. Evidence of general reputation, which is a cumulation of perception testimonies, heard and gathered and reduced to an assertion to Court, is not admissible, but the opinion or belief of a person specially competent in this respect, as expressed by his conduct in outward behaviour, is relevant. It is this conduct, which can be tendered in evidence, and the Court is to examine whether such conduct is based on the opinion held by the person.¹

On a question of pedigree, family conduct is admissible to prove relationship; and the treatment of friends and neighbours may be received as presumptive proof of marriage. The opinion on behalf of a family regarding relationship may be inferred from the family conduct, e.g., distribution of family property; tacit recognition of relations.

Proviso.—The proviso indicates that opinion on relationship cannot be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions for bigamy, adultery, and enticing away married women. The fact of

¹ *Chandu Lal Agarwala v. Khalilar Rahaman*, [1942] 2 Cal. 299.

the marriage must be strictly proved in the regular way.¹

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Grounds of opinion
when relevant.

ILLUSTRATION.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

COMMENT.—Where the opinion of an expert is receivable, the grounds of reasoning upon which such opinion is based may also be inquired into. Opinion is no evidence, without assigning the reason of such opinion. The correctness of the opinion can better be estimated in many instances when the reasons upon which it is based are known. If the reasons are frivolous or inconclusive, the opinion is worth nothing.

CHARACTER WHEN RELEVANT.

52. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

In civil cases character
to prove conduct
imputed irrelevant.

COMMENT.—In civil cases evidence of the character of any party to the suit to prove the probability or improbability of any conduct imputed to him is irrelevant.

"In respect of the character of a party, two distinctions must be drawn, namely between the cases when the character is in issue and is not in issue and when the cause is civil or criminal. When a party's general character is itself in issue, whether in a civil or criminal proceeding, proof must necessarily be received of what that general character is, or is not. But when general character is not in issue but is tendered in support of some other issue it is, as a general rule, excluded. So in civil proceedings evidence of character to prove conduct imputed is declared by the Act to be irrelevant [s. 52]. The two exceptions to this rule are, that in civil proceedings evidence of character as affecting damages, is admissible [s. 55]; and in criminal proceedings... the fact that the person accused is of a good character, is relevant, but the fact that he has a bad character is, except in certain specified cases, irrelevant [ss. 53 and 54]".²

Principle.—The general exclusion of character evidence is based on grounds of public policy and fairness, since its admission would surprise and prejudice the parties by raking up the whole of their careers, which they could not possibly come into Court prepared to defend.³ The business of the Court is to try the case, and not the man; and a very bad man may have a very righteous cause.⁴

Scope.—This section refers to the character of parties to the suit, and not to the character of witnesses. It excludes evidence of character from being given only for the purpose of rendering probable or improbable any conduct imputed

¹ *Empress v. Pitambur Singh*, (1879) 5 Cal. 566, F.B.; *Wadhawa v. Fatteh Muhammad*, (1893) P. R. No. 5 of 1894 (Cr.).

² Woodroffe and Ameer Ali's Evi-

dence, 9th Edn., p. 470.

³ *The Queen v. Rowton*, (1865) 34 L. J. (M. C.) 57.

⁴ Wigmore, 135.

to the party. But, when the facts which are relevant otherwise than for the purpose of showing character are proved, and those facts raise inferences concerning the character of a party to the suit, such facts become relevant not only to prove the facts for which they were directly tendered, but also for the purpose of showing the character of the party concerned. In such a case it is open to the Court to form its own conclusion as to the character of the party, and as to the effect of such character on the conduct imputed to the party.¹

'Character'.—The word 'character' occurring in this section and ss. 53 and 54 has been defined in the Explanation to s. 55. 'Character' is a combination of the peculiar qualities impressed by nature or by habit of the person, which distinguish him from others.²

The evidence of character relates either (a) to character of witnesses, or (b) to character of parties. Character of a witness affects his credit and is always material as it helps the Court to come to the conclusion whether his evidence should be treated as trustworthy. Questions touching the character of a witness are allowed to be put to a witness who comes to give evidence in a case.

In criminal cases previous good character relevant.

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

COMMENT.—Principle.—The principle upon which good character may be proved is that it affords a presumption against the commission of crime. This presumption arises from the improbability, as a general rule as proved by common observation and experience, that a man who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur; but they are exceptions. The rule is otherwise; the influence of this presumption from character will necessarily vary according to the circumstances of different cases.³

"Though general evidence of bad character", says Sir J. Stephen, "is not admitted against the prisoner, general evidence of good character is always admitted in his favour. This would, no doubt, be an inconsistency justifiable, or, at least, intelligible, on the ground of the humanity of English law, if such evidence were not often of great importance as tending to explain conduct. A loses his watch; B is found in possession of it next day, and says he found it, and was keeping it for the owner. If A and B are strangers, and if B can call no one to speak to his character, this is a very poor excuse; but if B is a friend of A's, and of the same position in life, and if he calls many respectable people, who have known him from childhood, and say he is a perfectly honest man, the story becomes highly probable. If the same thing happened to a thoroughly respectable well-established inhabitant of the town—say, for instance, to the rector of the parish, being a man of first-rate character and large fortune—no one would think twice of it. These illustrations give the true theory of evidence of character. Judges frequently tell juries that evidence of character cannot be of use where the case is clearly proved, except in mitigation (or, possibly, aggravation) of punishment; but that, if they have any doubt, evidence of character is highly important. This always seems to me to be equivalent to saying, 'If you think the prisoner guilty, say so; and if you think you ought to acquit him independently of the evidence of character, acquit him rather more readily because of it'. Evidence of character would thus be super-

¹ Norton, 230.

² Webster.

³ Wigmore, 123.

fluous in every case. The true distinction is, that evidence of character may explain conduct, but cannot alter facts".¹

54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character,¹ in which case it becomes relevant.

Previous bad character not relevant, except in reply.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.

COMMENT.—Principle.—Evidence of bad character of an accused person (of whose good character evidence has not been given) is not relevant under this section for the purpose of raising a general inference that the accused is likely to have committed the offence charged. Such evidence is relevant and cannot be legally admitted in evidence whether elicited by the prosecution or by the defence.² A man's guilt is to be established by proof of the facts alleged and not by proof of his character; such evidence might create prejudice but not lead a step towards substantiation of guilt.³ The prohibition does not in any way affect evidence which is required to prove a motive for the crime or which is otherwise relevant.⁴ But in assessing punishment the Court may take into consideration the accused's character and antecedents or the state of crime in the country or locality.⁵

If evidence is otherwise relevant, it is not rendered inadmissible under this section, merely because it shows bad character or the commission of offences other than the offence with which the accused is charged.⁶

Where an accused person is not called to give evidence and does not put his own character in issue, no evidence can be given by the prosecution of his bad character merely because he has attacked the character of witnesses for the prosecution. Where evidence of bad character of the accused is admissible during trial it must be given by a witness who is able to swear to it of his own knowledge and it is not sufficient, before verdict, for a police officer to read out a record of the accused's previous convictions when he has not been present thereto.⁷

1. 'Unless evidence has been given that he has a good character'.—Where the accused has attempted to show his good character in his own aid under the preceding section, the prosecution may in rebuttal offer evidence of his bad character. The accused by going into his own character gives a challenge to the prosecution. The prosecution, therefore, is at liberty to refute his claim that he has a good character, otherwise the Court would be misled.

Explanation 1.—Where the bad character of any person is itself a fact in issue, then the principle of this section does not apply. See s. 110(f) of the Criminal Procedure Code.

¹ General View of the Criminal Law of England, pp. 311, 312.

² *Mi Myin v. King-Emperor*, (1908) 5 L. B. R. 4; *Emperor v. Gangaram*, (1920) 22 Bom. L. R. 1274.

³ *Amrita Lal Hazra v. Emperor*, (1915) 42 Cal. 957.

⁴ *Jagwa Dhanuk v. King-Emperor*, L. E.—9.

(1925) 5 Pat. 63.

⁵ *King-Emperor v. Nga Ba Shein*, (1928) 6 Ran. 391, F.B.

⁶ *Sarojekumar Chakrabarti v. Emperor*, (1932) 59 Cal. 1361.

⁷ *Rea v. Butterwasser*, [1948] 1 K.B. 4.

Explanation 2.—A previous conviction is not admissible in evidence against the accused, except where he is liable to enhanced punishment under s. 75 of the Penal Code on account of previous conviction or unless evidence of good character be given, in which case the fact that the accused has been previously convicted of an offence is admissible as evidence of bad character.¹

A previous conviction may also be relevant under s. 8 as showing motive. It may also become relevant within the meaning of s. 14, Explanation 2, when the existence of any state of mind, or body, or bodily feeling, is in issue or relevant.² It may also be relevant under s. 43. See illustration (e).

CASE.—At the trial of the accused for committing or conspiring to commit a dacoity, it was sought to be proved by the prosecution that some of the accused were closely associated with the approver and the object of that association had been the commission of thefts and other discreditable acts. It was held that the evidence was irrelevant either (a) to show the bad character of the accused, or (b) under s. 14 to show the existence of relevant state of mind, since a tendency to commit theft does not throw any light on the existence of an intention to commit or to conspire to commit a particular dacoity, or (c) under s. 11 to show the nature and character of the association :³ for association for the purpose of committing petty thefts does not render probable the existence of a conspiracy to commit dacoity. For what is worth, the evidence is admissible to show close association with the approver and thus to support his statement that a conspiracy existed in fact.

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In sections 52, 53, 54 and 55, the word “character” includes both reputation and disposition; but, except as provided in section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

COMMENT.—Principle.—In civil cases good character, being presumed, may not be proved in aggravation of damages, but bad character is admissible in mitigation of damages, provided that it would not, if pleaded, amount to a justification. For example, in cases of defamation the general bad reputation of the plaintiff may be proved. In cases of breach of promise of marriage the plaintiff's general character for immorality is relevant. In cases of seduction evidence of the general character for immorality on the part of the person seduced is relevant. The argument in favour of considering reputation is that the person should not be paid for the loss of that which he never had.

Evidence of reputation or disposition must be confined to the particular traits which the charge is concerned about. Thus, it would be useless to offer evidence of a prisoner's reputation of honesty on a charge of cruelty, or of his mild disposition

¹ *Emperor v. Duming*, (1903) 5 Bom. L. R. 805, 28 Bom. 129.

² Bom. L. R. 1034; *Teka Ahir v. The King-Emperor*, (1920) 5 P. L. J. 706.

³ *Emperor v. Wahiduddin (No. 1)*, (1929) 32 Bom. L. R. 324, 54 Bom.

² *Emperor v. Alloomiya*, (1903) 5 524.

on a charge of theft. Reputation for honesty would be relevant on a charge of theft, and a merciful disposition on a charge of cruelty.¹

Explanation.—The word 'character' includes both reputation and disposition. According to English law 'character' is not synonymous with 'disposition', it simply means reputation. 'Reputation' means what is thought of a person by others, and is constituted by public opinion. 'Disposition' respects the whole frame and texture of the mind. It comprehends the springs and motives of actions. 'Temper' influences the action of the moment, 'disposition' is permanent and settled; 'temper' may be transitory and fluctuating. It is possible and not unfrequent to have a good disposition with a bad temper, and *vice versa*.²

¹ Norton, 234.

² Crabb's Synonyms, p. 323.

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED.

Fact judicially noticeable need not be proved.

56. No fact of which the Court will take judicial notice¹ need be proved.

COMMENT.—Part I dealt with what facts may, and what facts may not, be proved in a civil or criminal case. Part II deals with the question what sort of evidence must be given of a fact which may be proved. This Part shows the manner in which a fact in issue or relevant fact must be proved.

All facts in issue and relevant facts must be proved by evidence, either oral or documentary. To this rule there are two exceptions: (a) facts judicially noticeable; and (b) facts admitted.

In the case of the facts dealt with by this section, the Judge's belief in their existence is induced by the general knowledge acquired otherwise than in particular proceedings before the Court and independently of the action of the parties therein. The meaning of the section will, however, be apparent, if we consider together with this section the last words of s. 57. What these two provisions really come to is this: With regard to the facts enumerated in s. 57, if their existence comes into question, the parties who assert their existence, or the contrary, need not in the first instance produce any evidence, in support of their assertions. They need only ask the Judge to say whether these facts exist or not, and if the Judge's own knowledge will not help him, then he must look the matter up; further, the Judge can, if he thinks proper, call upon the parties to assist him. But in making this investigation the Judge is emancipated entirely from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy and which he thinks will help him. Thus he may consult any book or obtain information from a bystander.¹

1. 'Take judicial notice'.—This expression means recognition without proof of something as existing or as being true. Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters within the common knowledge of every one has never been questioned.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts:—

- (1) All Indian laws:
- (2) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed:
- (3) Articles of War for Her Majesty's Army, Navy or Air Force:

¹ Markby, 49.

(4) The course of proceeding of Parliament and of the legislatures established under any laws for the time being in force in the Provinces.*

Explanation.—The word 'Parliament' in clauses (2) and (4) includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland ;

(2) the Parliament of Great Britain ;

(3) The Parliament of England ;

(4) the Parliament of Scotland ; and

(5) the Parliament of Ireland ;

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6) all seals of which English Courts take judicial notice : the seals of all the Courts in the Provinces of India,* and of all Courts out of the Provinces* established by the authority of the Central Government or the Crown Representative : the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to use by any Act of Parliament or other Act or Regulation having the force of law in the Provinces.*

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any Province,* if the fact of their appointment to such office is notified in any Official Gazette :

(8) the existence, title and national flag of every State or Sovereign recognized by the British Crown :

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette :

(10) the territories under the dominion of the British Crown :

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons :

(12) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it :

(13) the rule of the road on land or at sea.

In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

COMMENT.—The list of facts of which the Court shall take judicial notice and which are enumerated in this section is not exhaustive. It is for the sake of convenience that the Courts are allowed to take judicial notice of certain facts which are so clearly established that evidence of their existence is unnecessary.

* As amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

Under cl. (1) of this section the Court should take judicial notice of all Indian laws. "Indian Law" is defined by the General Clauses Act, s. 3 (27-a), and includes any law, ordinance, order, bye-law, or regulation passed or made at any time by any competent Legislature, authority, or person in the Provinces.¹

The section does not appear to have the effect of absolving the parties from any rules governing the proof of facts on which they desire to rely. The section does not say how any fact, historical or otherwise, is to be proved by the parties, but gives the Court liberty to resort for its aid to appropriate books or documents of reference on matters of public history.²

Clause 1.—The expression "All Indian laws" includes statutory law as well as unwritten law whether of a personal or of a local nature. A report made by an officer containing customary law applicable to a particular community is admissible in evidence.³

Clause 2.—Statutes are either public or private, general or special.... A *public* or *general* Act is a universal rule applied to the whole community, which the Courts must notice judicially and *ex officio*, although not formally set forth by a party claiming an advantage under it. But *special* or *private* Acts are rather exceptions than rules, since they only operate upon particular persons and private concerns, and the Courts are not bound to take notice of them, if they are not formally pleaded, unless an express clause is inserted in them that they shall be deemed public Acts and shall be judicially noticed as such without being specially pleaded—which provision is now usually introduced.⁴

Clause 3.—Articles of War for native officers, soldiers, etc., are contained in the Indian Army Act (VIII of 1911).

Clause 7.—Judicial notice of the signatures of the Secretaries to the Government on any instrument can be taken under this clause.⁵

Clause 8.—All Courts must take judicial notice of the existence and title of every State or Sovereign recognised by the British Crown. All Indian States are so recognised.⁶

Clause 9.—The phrase 'divisions of time' includes also Indian eras. Thus Samvat, Shaka, Hindi, Bengali, Hizari and Jalus eras will be judicially noticed. The Court is bound to take judicial notice of the holidays notified in the Official Gazette of any Local Government.⁷

Clause 13.—'The rule of the road on land or at sea'.—This means the rule that horses and vehicles of all description should keep to the left side of the road. At sea, the rule is that ships and steam-boats, on meeting, should port their helms, so as to pass on the port or left side of such other; steam-boats should keep out of the way of sailing ships; and every vessel overtaking another should keep out of its way.

On all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference.

Under the last paragraph the Court is given the discretion to refuse to take judicial notice of any fact unless the person calling upon the Court to take judicial notice of such fact produced any such book or document as may be necessary to enable it to do so.⁸

¹ *Public Prosecutor v. Thippayya, Emperor*, (1944) 23 Pat. 475.
[1949] Mad. 371.

² "*The Englishman*," *Ltd. v. Laipat Rai*, (1910) 37 Cal. 760.

³ *Tula Ram Sah v. Shyam Lal Sah*, (1924) 49 All. 848.

⁴ Field, 8th Ed., p. 418.

⁵ *Kali Pad Upadhyaya v. King-*

⁶ *H. H. The Maharaja of Kashmir v. Mohan Lal*, (1886) P. R. No. 51 of 1886 (Civil).

⁷ *Gyan Singh v. Budha*, (1932) 14 Lah. 240.

⁸ *Public Prosecutor v. Thippayya*, [1949] Mad. 371.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings :

Facts admitted need not be proved.

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

COMMENT.—Admissions by parties before suit are dealt with in s. 17, *et seq.* This section deals with admissions at or before the hearing.

Principle.—No proof need be given of facts which the parties or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by writing under their hands, or which, by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings.¹ Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. The Court may in its discretion require any fact so admitted to be proved otherwise than by such admission (O. VIII, r. 3, Civil Procedure Code). Where a document is not admitted in the pleadings but only at the trial in evidence, the document must be proved.²

A Court, in general has to try the questions on which the parties are at issue not those on which they are agreed. Admissions which have been deliberately made for the purposes of the suit, whether in the pleading or by agreement, will act as an estoppel to the admission of any evidence contradicting them.³ It is with the object of doing away with the necessity of proving documents of facts admitted that admissions are obtained, and the party reasonably refusing or neglecting to admit any documents of facts when called upon to do so may be ordered to pay the costs of proof.

Formal proof of a document even when it is required to be proved in a certain way (e.g., by calling a person who has attested it, see. s. 68, *infra*) may be waived by any of the parties whose interests it may affect, although such waiver does not affect the legal character of the document or its validity.⁴ If an agreement of discharge or satisfaction be admitted in the pleadings and hence no question of proof by oral or documentary evidence arises by virtue of this section, such compromise cannot be said to be inadmissible for want of registration.⁵

This section has no application to divorce cases.⁶

In the Civil Procedure Code provision has been made for admission of facts by parties or their pleaders before the hearing (O. XII, rr. 1-9).

Proviso.—If the Court is satisfied that the admission has been obtained by fraud or that there is other good and sufficient cause, it will be in its discretion, under the proviso, to require the fact to be proved otherwise than by such admission.⁷

¹ Markby, 50. See *Maung Po Kin v. Maung Shwe Bya*, (1923) 1 Ran. 405.

² *Maung Wala v. Maung Shwe Gon*, (1923) 1 Ran. 472.

³ *Burjorji Cursetji Panthaki v. Muncherji Kuwerji*, (1880) 5 Bom. 143, 152.

⁴ *Bajinath Singh v. Mussammat Biraj Kuer*, (1922) 2 Pat. 52; *Arjun Sahu v. Kelai Rath*, (1922) 2 Pat. 317.

⁵ *Ramchandra Sau v. Kailashchandra Patra*, (1930) 58 Cal. 532.

⁶ *Over v. Over*, (1924) 27 Bom. L. R. 251, 49 Bom. 368.

⁷ *Oriental Government Security Life Assurance Company, Limited v. Narasinha Chari*, (1901) 25 Mad. 183, 205.

CHAPTER IV.

OF ORAL EVIDENCE.

Proof of facts by
oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

COMMENT.—Oral evidence has been defined by the Act to be all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry (s. 3). All facts except the contents of documents may be proved by oral evidence. This section is not happily worded. Contents of documents may be proved by oral evidence under certain circumstances, viz., when evidence of their contents is admissible as secondary evidence.

Oral evidence, if worthy of credit, is sufficient without documentary evidence to prove a fact or title.

It is a cardinal rule of evidence that where written documents exist, they must be produced as being the best evidence of their own contents.¹ Where oral testimony is conflicting, much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented.²

Where a fact may be proved by oral evidence it is not necessary that the statement of the witness should be oral. Any method of communicating thought which the circumstances of the case or the physical condition of the witness demand may, in the discretion of the Court, be employed. Thus a deaf-mute may testify by signs, by writing, or through an interpreter. So where a dying woman, conscious, but without power of articulation, was asked whether the defendant was her assailant, and if so, to squeeze the hand of the questioner, the question and the fact of her affirmative pressure were held admissible in evidence.³ A woman whose throat had been cut was unable to speak owing to the nature of the wound. She was fully conscious and able to understand what was said to her, to make signs and to nod her head slightly. She was asked whether it was the accused who had cut her throat, and she nodded her head. She died afterwards. It was held that evidence as to signs made in answer to questions put to her was admissible.⁴

60. Oral evidence must, in all cases whatever, be direct; that is to say—

Oral evidence must
be direct.

- (1) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
- (2) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
- (3) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
- (4) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise com-

¹ *Dinomoyi Debi v. Roy Luchmiput Singh*, (1879) 7 I. A. 8.

² *Meer Usdoolah v. Mussumat Beeby Imaman*, (1836) 1 M. I. A. 19, 42, 43.

³ *Queen-Empress v. Abdullah*, (1885) 7 All. 385, F.B.

⁴ *Chandrasekera Alias Alisandiri v. The King*, [1937] A.C. 220, (1936) 39 Bom. L. R. 359.

monly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable :

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

COMMENT.—This section says that oral evidence must be direct, that is, if it refers to

- (1) a fact which could be seen,
the evidence must be of a witness who says he saw it ;
- (2) a fact which could be heard,
the evidence must be of a witness who says he heard it ;
- (3) a fact which could be perceived by any other sense or manner,
the evidence must be of a witness who says he perceived it by that sense or that manner ;
- (4) an opinion, or the grounds on which that opinion is held,
the evidence must be of a person who holds that opinion on those grounds.

This section, subject to the proviso, excludes opinions given at second-hand. The use of the word 'must' in the first clause of the section imposes a duty on the Court to exclude all oral evidence that is not 'direct', whether the party against whom it is tendered objects or not.¹ The word 'direct' is opposed to mediate or derivative or 'hearsay'.

The term *hearsay* is used with reference to what is *done* or *written*, as well as to what is *spoken*, and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, and that in many cases it supposes some better testimony which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which may be practised with impunity under its cover, combine to support the rule that hearsay evidence is "inadmissible".² "The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say ; sometimes it means whatever a person declares on information given by some one else ; sometimes it is treated as nearly synonymous with 'irrelevant' ".³

The expressions 'saw it', 'heard it', and 'perceived it', in cls. 2, 3 and 4 of the section mean 'saw the fact deposed to', 'heard the fact deposed to', and 'perceived the fact deposed to'.

"Derivative or second-hand proofs are not receivable as evidence in *causa*.... Instead of stating as maxim that the law requires all evidence to be given *on oath* we should say that the law requires all evidence to be given *under personal responsibility* ; i.e., every witness must give his testimony, under such circumstances as expose him to all the penalties of falsehood, which may be inflicted by any of

¹ Stokes' Anglo-Indian Codes, Vol. II, p. 889.

² Taylor, 12th Edn., s. 570, p. 363.

³ Stephen's Introduction, p. 4.

the sanctions of truth....The true principle therefore appears to be this,—that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected".¹

Derivative or second-hand evidence is excluded owing to its infirmity as compared with its original source.

The Select Committee in their Report observed: "This provision taken in connection with the provisions of relevancy contained in Chap. II will, we hope, set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is that:—(1) the sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted; (2) in some excepted cases they are relevant; (3) every act done or word spoken which is relevant on any ground must (if proved by oral evidence) be proved by someone who saw it with his own eyes or heard it with his own ears."

A written information is not evidence. If it is desired to make the matter contained in its evidence, a person who can directly testify to such matter must be produced.²

Hearsay evidence which ought to have been rejected as irrelevant does not become admissible as against a party merely because his counsel fails to take objection when the evidence is tendered.³

Proviso 1.—The first proviso is a departure from the rule of English law, under which medical and other treatises are not admissible, whether the author is alive or not. Any scientific text-book commonly offered for sale is admissible in evidence under the circumstances mentioned in the proviso. Section 45 refers to the evidence of expert witnesses who may be examined in Court. Section 38 refers to books on law.

Proviso 2.—This proviso enables the Court to require the production of a material thing for its inspection. Under s. 165 the Court has power to direct the production of any document or thing in order to discover or to obtain proper proof of relevant facts.

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

COMMENT.—Documentary evidence means all documents produced for the inspection of the Court (s. 3). Documents are of two kinds: public and private. Section 74 gives a list of documents which are regarded as public documents. All other documents are private. The production of documents in Courts is regulated by the Civil Procedure Code and the Criminal Procedure Code.

Principle.—The contents of documents must be proved either by the production of the document which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. The section lays

¹ Best, 12th Edn., ss. 493, 494, pp. (1924) 5 Lah. 396.
415, 416.

² *Mt Hawk v. King-Emperor*, (1907) & *Co.*, (1927) 30 Bom. L. R. 735, P.C.
4 L. B. R. 121; *Lal Singh v. The Crown*,

down that the contents of the document may be proved either by primary or secondary evidence and the rule means that there is no other method allowed by law for proving the contents of documents.¹

Primary evidence is evidence which the law requires to be given first. Secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better record. Primary evidence is defined in s. 62 and secondary evidence, in s. 63.

Primary evidence. **62. Primary evidence means the document itself produced for the inspection of the Court.**

Explanation 1.—Where a document is executed in several parts,¹ each part is primary evidence of the document.

Where a document is executed in counterpart,² each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

ILLUSTRATION.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

COMMENT.—This section defines the meaning of primary evidence which means the document itself produced for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart is primary evidence as against the party executing it. Where a number of documents are made by printing, lithography, or photography, each is primary evidence of the contents of the rest. Where they are copies of a common original they are not primary evidence of the contents of the original.

Primary evidence is the evidence which the law requires to be given first.

1. 'Document is executed in several parts'.—Sometimes each party to a transaction wishes for the sake of convenience to have a complete document in his own possession. To effect this, the document is written out as many times over as there are parties, and each document is executed, i.e., signed or sealed, as the case may be, by all the parties. Any one of them may be produced as primary evidence of the contents of the document.

2. 'Document is executed in counterpart'.—A document is executed in counterparts when there are two parties to the transaction. Thus, if the transaction is a contract between A and B the document is copied out twice, and A alone signs one document, whilst B alone signs the other. A then hands to B the document signed by himself, and B hands to A the document signed by himself. Then, as against A, the document signed by A is primary evidence, whilst, as against

¹ *Ram Prasad v. Raghunandan Prasad*, (1885) 7 All. 738, 743.

B, the document signed by B is primary evidence. If there are two contemporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered.¹

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it, and secondary evidence as against other parties (see s. 68, cl. 4).

Secondary evidence.

63. Secondary evidence means and includes—

- (1) certified copies given under the provisions hereinafter contained ;
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies ;
- (3) copies made from or compared with the original ;
- (4) counterpart of documents as against the parties who did not execute them ;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

ILLUSTRATIONS.

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy, compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original is secondary evidence ; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

COMMENT.—This section describes what constitutes ‘secondary evidence’. ‘Secondary evidence’ is evidence which may be given under certain circumstances in the absence of that better evidence which the law requires to be given first.

Secondary evidence means and includes—

- (1) certified copies ;
 - (2) copies made from the original by mechanical processes, and copies compared with such copies ;
 - (3) copies made from or compared with the original ;
 - (4) counterparts of documents as against the parties who did not execute them ;
 - (5) oral accounts of the contents of a document by a person who has seen it.
- Clauses 1 to 3 deal with copies of documents. Where a copy of a document

¹ *Philipson v. Chase*, (1909) 2 Camp. 110.

is admitted in evidence in the trial Court without objection, its admissibility cannot be challenged in the Appeal Court. Because omission to object to its admission implies that it is a true copy and, therefore, it is not open to the Appeal Court to say whether the copy was properly compared with the original or not.¹

Clause 1.—Section 76 defines the expression “certified copies”. See also ss. 77, 78, 79 and 86.

The correctness of certified copies will be presumed under s. 79; but that of other copies will have to be proved. This proof may be afforded by calling a witness who can swear that he has compared the copy tendered in evidence with the original or with what some other person read as the contents of the original and that such is correct.

Clause 2.—Reading cl. 2 and illustrations (b) and (c) together it will appear that a copy of a copy, i.e., a copy, transcribed from, and compared with, a copy, is inadmissible unless the copy with which it was compared was a copy made by some mechanical process which in itself insures the accuracy of such copy. See ill. (b).

Copies of copies kept in a registration office, when signed and sealed by the registering officer, are admissible for the purpose of proving the contents of the originals (s. 57(5), Act XVI of 1908).

Letter-process copies and photographs of writings are secondary evidence (*vide* ill. (a)).

Clause 3.—Copies made from the original or copies compared with the original are admissible as secondary evidence. A copy of a copy, when compared with the original, would be receivable as secondary evidence of the original (ill. (b)).

Illustration (c) lays down in express language that “a copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but a copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original”. A copy of a certified copy of a document, which has not been compared with the original, cannot be admitted in evidence, such a copy being neither primary nor secondary evidence of the contents of the original.²

Documents which are merely copies of copies, the originals not having been satisfactorily accounted for, are inadmissible in evidence and must be rejected.³

An abstract translation or a complete translation of a document is not ‘copy made from and compared with the original’ within the meaning of this clause.⁴

Clause 4.—When a document is executed in counterpart, each party signing only the part by which he is bound, each counterpart is the best evidence against the party signing it and his privies. As to the other party it is only secondary evidence.

Clause 5.—Secondary evidence includes, according to cl. 5, oral accounts of the contents of a document, given by some person who has himself seen the ori-

¹ *Chimnaji Govind Godbole v. Dinkar Dhondev Godbole*, (1886) 11 Bom. 320; *Lakshman v. Amrit*, (1900) 24 Bom. 591, 2 Bom. L. R. 386; *Kishore Lal Goswami v. Rakhal Das Banerjee*, (1903) 31 Cal. 155; *Ram Lochan Misra v. Pandit Harinath Misra*, (1922) 1 Pat. 606.

² *Ram Prasad v. Raghunandan Prasad*, (1885) 7 All. 738, 743; *Narasimham v. Babu Rao*, [1939] Mad. 333.

³ *Mahadeva Royal v. Virabasava Royal*, (1948) 50 Bom. L. R. 638, P.C.

⁴ *Muhammad Suleman v. Hari Ram*, [1936] 21 Lah. 363.

ginal document.¹ But a written statement of the contents of a copy of a document, the original of which the person making the statement has not seen, cannot be accepted as secondary evidence.² This clause does not necessarily mean that a witness who is called to give evidence as to a lost document must have himself read the document. He would be a competent witness if, having physically seen the document, the contents thereof had been read out or explained to him.³

Proof of documents
by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

COMMENT.—Principle.—A written document can only be proved by the instrument itself. It is a general rule that if a person wants to get at the contents of a written document the proper way is to produce it if he can. "Where the contents of *any document* are in question, either as a fact in issue or a subalternate principal fact, the document is the proper evidence of its *own contents*, and all derivative proof is rejected until its absence is accounted for. But where a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. . . . So, although where the *contents* of a marriage register are in issue, verbal evidence of those contents is not receivable, yet the *fact* of the marriage may be proved by the independent evidence of a person who was present at it."⁴

Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document, or unless the genuineness of a document produced is in question.

65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases :—

Cases in which secondary evidence relating to documents may be given.

(a) when the original is shown or appears to be in the possession or power—

of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it ;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d) when the original is of such a nature as not to be easily moveable ;

¹ *Ma Mi v. Kallander Ammal* (No. 2), [1936] 54 I. A. 61, 29 Bom. L. R. 800, 5 Ran. 18.

² *Kanayala v. Pyarabai*, (1882) 7 Bom. 139.

³ *Mehi Lal v. Ramji Das*, (1924) 47 All. 13.

⁴ Best, 2nd Edn., p. 282 ; *Balbhadar Prasad v. The Maharajah of Betia*, (1887) 9 All. 351, 356.

(e) when the original is a public document within the meaning of section 74 ;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

COMMENT.—This section enumerates the seven exceptional cases in which secondary evidence is admissible. Under it secondary evidence may be given of the contents of a document in civil as well as in criminal proceedings. Under the English law stricter proof in criminal than in civil proceedings is required.

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such manner as to bring it within one or other of the cases provided for in the section.¹ It is incumbent on the person who tenders secondary evidence to show that it is admissible and that the question of admissibility is ordinarily for the Court of first instance.² Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given.³

'Document' means a document admissible in evidence. If a document is inadmissible in consequence of not being registered or not being properly stamped, secondary evidence cannot be given of its existence.⁴ There is a distinction between relevancy and admissibility of documents. A document which is not relevant to the issue will be discarded by the Court, even though the opposite party does not object to it. If it is relevant to an issue, but cannot be admitted unless certain conditions are first complied with, as for instance, the proof of the loss of the original, then the absence of an objection by the opposite party to the admission of the document must be deemed to be tantamount to an admission of the existence of those circumstances and the document becomes admissible.⁵

The section deals with the proof of the contents of documents tendered in evidence.

Clause (a).—The document need not be in the actual possession of the party ; it is enough if it is in his power.

The expression 'not subject to' seems intended to include the case of a person

¹ *Krishna Kishori Chaudhrani v. Kishori Lal Roy*, (1887) 14 Cal. 486, 14 I. A. 71.

² *Abdul Rasack v. Ma U*, (1898) 2 U. B. R. (1897-1901) 382.

³ *Abdul Rasack v. Ma U*, (1898) 2

U. B. R. (1897-1901) 376.

⁴ *Stokes' Anglo-Indian Codes*, Vol. II, p. 892.

⁵ *Badrul Islam Ali Khan v. Mst. Ali Begum*, (1935) 16 Lah. 782, 802.

not legally bound to produce the document, who refuses to produce it.¹

'Legally bound to produce it'.—The wording of this clause has given rise to considerable doubt. Secondary evidence of a document is admissible when the original appears to be in the possession of *any person legally bound to produce it*. This clearly covers a document which is unjustifiably withheld by any person, thus differing from the English law on the point. But if a person summoned to produce a document objects to do so and his objection is upheld by the Court, it seems equally clear that such a document does not fall within the words of this section. It may be, however, that the Courts will admit secondary evidence in such a case upon the general principles of the English law and the decisions of the English Courts upon the subject.²

'When after the notice mentioned in s. 66, such person does not produce it'.—This clause seems to mean: when any person in whose possession or power the original may be, after receiving the notice (if any) required by s. 66, does not produce such original.³ The sole object of a notice to produce is to enable the adversary to have the document in Court to produce it if he likes, and, if he does not, to enable his opponent to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to procure the original, which he must do before he can be permitted to make use of secondary evidence.⁴

Clause (b).—This clause must be read with s. 22. Under it the written admission may always be proved. The oral admission can only be proved under the circumstances mentioned in clauses (a), (c) and (d). But secondary evidence by means of a written admission under this clause cannot be given of the contents of a document, which is inadmissible for want of registration⁵ or of stamps.⁶

Clause (c).—Secondary evidence is admissible when the party offering evidence of the contents of a document cannot for any reason not arising from his own default or neglect produce the original document in reasonable time.⁷ Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for.⁸ It is not permissible to go to other evidence for the purpose of indicating what the contents of the document may prove to be if once it were examined.⁹ There must be evidence on the record to show that the document has been lost.¹⁰

To prove the loss of a document, evidence of diligent search is necessary. See illustration (b) to s. 104. Copies are inadmissible without proof of the search of the originals.¹¹ The loss of a document can never be proved absolutely. Where

¹ Stokes' Anglo-Indian Codes, Vol. II, p. 892.

² Field, 8th Edn., p. 436.

³ Stokes' Anglo-Indian Codes, Vol. II, p. 892.

⁴ Dwyer v. Collins, (1852) 7 Ex. 639, 647.

⁵ Varada v. Krishnasami, (1882) 6 Mad. 117.

⁶ Damodar Jagannath v. Atmaram Babaji, (1888) 12 Bom. 443.

⁷ Surendra Krishna Roy v. Mirza Mahammad Syed Ali Matwali, (1935) 68 I. A. 85, 38 Bom. L. R. 330.

⁸ Muhammad Zafar v. Zahur Husain, (1926) 49 Ail. 78; Womesh Chunder Ghose v. Shama Sundari Bai, (1881) 7 Cal. 98; Mt. Hana v. Lokumal, [1943] Kar. 420.

⁹ K. S. Bonnerji v. Sitanath, (1921) 24 Bom. L. R. 565, 49 I. A. 46, 49 Cal. 325.

¹⁰ Mohammad Khan v. Sheo Bhikh Singh, (1929) 5 Luck. 377.

¹¹ Krishna Kishori Chaudhrani v. Kishori Lal Roy, (1887) 14 Cal. 486, 14 I. A. 71; Harripria Debi v. Rukmini Debi, (1892) 19 Cal. 438, 19 I. A. 79.

a document has not been seen for many years, the statement by a person who was alleged to have been in possession of it that it was never with him nor was it with him then, is sufficient evidence of its loss.¹ Where a promissory note filed with a plaint disappeared from the Court file, it was held that the plaintiff was entitled, without showing how the disappearance or the loss arose or who abstracted it from the file, to give secondary evidence of it.² If a registered sale-deed is lost a certified copy can be put in as secondary evidence.³

Secondary evidence of a lost public document, other than a certified copy, is admissible upon proof of loss or destruction of the original, and further proof that no certified copy of the original is available to the party seeking to prove the contents of the original. So long as the original is in existence, no secondary evidence other than a certified copy is admissible.⁴ Where the record in a case has been destroyed and is not available for the purpose of proving previous convictions, secondary evidence under this clause is admissible.⁵

Secondary evidence of the contents of a document cannot be given by a party who is in custody of the original document.⁶

Clause (d).—This clause covers things not easily moved, as in the case of things fixed in the ground or a building; for example, notices painted on walls, tablets in buildings, tombstones, monuments, or marks on boundary trees. Secondary evidence is admissible on account of the great inconvenience and impracticability of producing the original.

Clause (e).—This clause is intended to protect the originals of public records from the danger to which they would be exposed by constant production in evidence. Secondary evidence is admissible in the case of public documents mentioned in s. 74. What s. 74 provides is that public records kept in British India of private documents are public documents, but private documents of which public records are kept are not in themselves public documents. A registered document, therefore, does not fall under either clause (e) or (f). The entry in the register book is a public document, but the original is a private document. A certified copy of the original cannot be given in evidence.

Public documents can only be proved by their production or by secondary evidence of the nature described in this clause; they cannot be proved by the oral evidence of a witness.⁷ The rule that a certified copy is the only secondary evidence admissible when the original is a public document, does not apply where the original has been lost or destroyed.⁸

Clause (f).—Certified copies are admissible as secondary evidence under this clause. Sections 76, 78 and 86 may be read along with it. Where an original document cannot be given in evidence owing to a statutory ban its certified copy cannot be admitted in evidence, e.g., certified copy of the income-tax return.⁹

The last but one paragraph of this section provides "in case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible."

¹ *Basant Singh v. Brijraj Saran Singh*, (1935) 37 Bom. L. R. 805, 62 I. A. 180, 57 All. 494.

² *Tulsi Ram v. Ram Saran*, (1924) 27 Bom. L. R. 777, P.C.

³ *Entisham Ali v. Jamna Prasad*, (1921) 24 Bom. L. R. 675, 48 I. A. 365.

⁴ *Syad Pir Shah v. Gulab Shah*, (1878) P. R. No. 63 of 1878 (Civil).

⁵ *Pokar v. Crown*, [1941] Kar. 308.

⁶ *Hira Lal v. Ganesh Prasad*, (1882) 4 All. 406, P.C.

⁷ *Gunga Ram v. The Emperor of India*, (1902) P. R. No. 5 of 1902 (Cr.).

⁸ *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*, (1926) 5 Pat. 777.

⁹ *Devidatt v. Shriram*, (1931) 34 Bom. L. R. 236, 56 Bom. 324.

This applies to the case in which the public document is still in existence on the public records.¹ Where a case falls under clause (a) or clause (c) and also under clause (f) any secondary evidence may be received.²

Clause (g).—This provision is meant for saving public time. Where the fact to be proved is the general result of the examination of numerous documents and not the contents of each particular document and the documents are such as cannot be conveniently examined in Court, evidence may be given, under this section, as to the general result of the documents by a person, who has examined them and who is skilled in the examination of those documents, although they may be public within the meaning of this section and s. 74.³

Objection to reception of secondary evidence in Appeal Court.—If a copy of a document is admitted in evidence in the first Court without any objection, no objection can be allowed to be taken in the Appeal Court as to its admissibility.⁴ The object of the rule is obvious, for, if objection is taken in the first Court, the party producing the copy can ask for an adjournment in order to get the original or else to give evidence justifying the admission of secondary evidence.

66. Secondary evidence of the contents¹ of the documents referred to in section 65, clause (a), shall not be given unless the party² proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

COMMENT.—This section lays down that a notice must be given before secondary evidence can be received under s. 65 (a). Notice to produce a document

¹ *Kalandan v. Kunhunni*, (1882) 6 Mad. 80, 81.

² *In the Matter of a Collision between the "Ava" and the "Brenhilda,"* (1879) 5 Cal. 568, 573.

³ *Sundar Kuar v. Chandreshwar Prasad Narain Singh*, (1907) 34 Cal. 298.

⁴ *Kishori Lal Goswami v. Rakhal*

Das Banerjee, (1903) 31 Cal. 155; *Akbur Ali v. Bhyea Lal Jha*, (1880) 6 Cal. 666; *Bacharam Mundul v. Pearu Mohun Banerjee*, (1883) 9 Cal. 813; *Narendra Narain Rai v. Bishun Chandra Das*, (1885) 12 Cal. 182; *Chitmnaji Govind Godbole v. Dinkar Dhondev Godbole*, (1886) 11 Bom. 320; *Thet She v. Maung Ba*, (1905) 3 L. B. R. 49.

must be in writing. Order XXI, r. 15, of the Civil Procedure Code, prescribes the kind of notice to produce a document.

Notice is required in order to give the opposite party a sufficient opportunity to produce the document, and thereby to secure the best evidence of its contents.¹ Such notice may be dispensed with if it is not necessary on the pleadings² or the Court thinks fit to dispense with it.³

1. 'Secondary evidence of the contents'.—"Secondary evidence of the contents" means apparently "not...of the existence or condition" of the documents.⁴

2. 'Party'.—This word means not only adversary in the cause, but also stranger 'legally bound to produce' the document.⁵

Proviso.—The proviso enumerates six cases in which a notice is not required to be given to the party in whose possession or power the document is, in order to render secondary evidence admissible.

The procedure for the production of documents in criminal cases is laid down in ss. 94-98 of the Criminal Procedure Code.

Section 175 of the Indian Penal Code punishes the person who omits to produce a document required by a public servant.

Proof of signature and handwriting of person alleged to have signed or written document produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

COMMENT.—This section merely requires proof of signature and handwriting of the person alleged to have signed or written the document produced.⁶ Mere admission of execution of a document is not sufficient. Proof that the signature of the executant is in his handwriting is necessary.⁷

The Evidence Act permits secondary evidence to be given with regard to the attestation of an attesting witness who is either dead or cannot be brought to Court. The signature of the attesting witness when proved in evidence is proof of every thing on the face of the document and that he saw the executant make his mark.⁸

As to the method of proof, see. ss. 47 and 73.

Besides the question which arises as to the contents of a document (see ss. 61-66), there is always the question when the document is used in evidence,—Is it what it purports to be? In other words, is it genuine? The evidence upon this point is dealt with in ss. 67-73. The nature of the evidence will depend to a large extent on the nature of the document. If it is a mere memorandum, such as the entry in a diary mentioned in s. 32(b), it must be proved that the diary was really that of the person whose statements it is said to contain. If it is a letter it must be shown who wrote it, or at any rate who signed it, for a signature to a document turns the

¹ *Surendra Krishna Roy v. Mirza* II, p. 893.

Mahammad Syed Ali Matwali, (1935)

63 I. A. 85, 38 Bom. L. R. 330.

² *Dinanath Rai v. Rama Rai*, (1926)

6 Pat. 102.

³ *Surendra Krishna Roy v. Mirza*

Mahammad, sup.

⁴ Stokes' Anglo-Indian Codes, Vol.

⁵ *Ibid.*

⁶ *Abdool Ali v. Abdoor Rahman*, (1874) 21 W. R. 429.

⁷ *Bulakidas v. Shaikh Chhotu*, [1942] Nag. 661.

⁸ *Ponnuswami Gounden v. Kalyana Sundara Ayyar*, (1934) 57 Mad. 662.

whole document into a statement by the person who signs it. If it is an agreement it must be shown who executed it.¹

Execution of document.—Execution means signing, sealing and delivery of a document. The term may be defined as a formal completion of a deed. It is the last act or series of acts which completes it.²

Mere registration of a document is not in itself sufficient proof of its execution.³

Case.—A deed of conveyance was tendered in evidence which purported to bear the mark of G, as vendor, and which was duly attested by four witnesses. G, however, denied that she had ever executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, and who swore that the signature of that witness to the attestation clause of the deed was genuine. It was held that the deed was admissible in evidence, its execution by G being sufficiently proved.⁴

68. If a document is required by law¹ to be attested,² it shall not be used as evidence³ until one attesting witness at least has been called for the purpose of proving its execution,⁴ if there be an attesting witness alive, and subject to the process of the Court and capable

Proof of execution of document required by law to be attested.

of giving evidence :

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.⁵

COMMENT.—This section applies to cases where an instrument required by law to be attested bears the necessary attestation. What the section prohibits is a proof of execution of a document otherwise than by the evidence of an attesting witness if available.⁶

This section applies only where the execution of a document has to be proved. Where, however, the execution is not to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that the attesting witness has not witnessed the execution of the document.⁶

The object of placing more attestations than one upon a document whether at the party's voluntary instance or by requirement of law, is ordinarily not to demand the combined testimony of all at the trial, but merely to provide by way of caution a number of witnesses ; so that the contingencies of death, removal of residence, and the like, may be guarded against, and one witness at least may be available. But the main object in statutes requiring attestation as an element of validity is to surround the act of execution with certain safeguards ; the object of securing evidence for litigation is a secondary one.⁷

¹ Markby, 60.

² *Bhawanji Hordhum v. Devji Punja*, (1894) 19 Bom. 635.

³ *Salimatul-Fatima Alias Bibi Hos-saini v. Koylashpoti Narain Singh*, (1890) 17 Cal. 903 ; *Bulakidas v. Shaikh Chhotu*, [1942] Nag. 661.

⁴ *Abdulla Paru v. Gannibai*, (1887)

11 Bom. 690.

⁵ *Veerappa Kavundan v. Ramasami Kavundan*, (1907) 30 Mad. 251 ; *Ram Gopal Lal v. Aipna Kunwar*, (1922) 44 All. 495, 49 I. A. 413.

⁶ *Komalsing Kuwarsing v. Krishna-bai*, (1945) 48 Bom. L. R. 83.

⁷ Wigmore, s. 1304.

This section is not permissive or enabling. It lays down the necessary requirements which the Court has to observe in order that a document can be held to be proved. The principle underlying the section is that execution of the will must be proved by at least one attesting witness, that it is only an attesting witness who is entitled to prove the execution of the will. It is a concession that the Legislature has made. If that concession does not result in complying with the mandatory requirements of this section the only proper method is to call the other attesting witness, so that both the attesting witnesses are before the Court, and the due execution of the will is proved by the two attesting witnesses which are necessary before a will can become a valid document.¹

1. 'Required by law'.—This means required by the law of the country where the property is situate. The rule as to the law of domicile is not extended to immoveable property.

2. 'Attested'.—"Attested" means that a person has signed the document by way of testimony to the fact that he saw it executed.² An attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment of the execution of the document by the executant.³ A document cannot be attested by a party to it. The object of attestation is that some person should verify that the deed was signed voluntarily. Knowledge of the contents of a document ought not to be inferred from the mere fact of attestation.⁴

'Attested', in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it is not necessary that more than one of such witnesses should be present at the same time, and no particular form of attestation is necessary (see s. 3 of the Transfer of Property Act and s. 63 (c) of the Indian Succession Act).

Where a document is written, executed and attested in one ink the presumption of due attestation is permissible under the maxim "*Omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*".⁵

"Personal acknowledgement" is not the equivalent of "express acknowledgment" by words and an acknowledgment may be inferred from gestures or conduct.⁶

According to the Allahabad, the Patna and the Bombay High Courts, the scribe of a mortgage deed cannot be counted as an attesting witness merely because he has signed the deed, even though the deed may in fact have been executed in his presence,⁷ but the Madras⁸ and the Calcutta⁹ High Courts have held to the

¹ *Vishnu Ram Krishna v. Nathu Vithal*, (1948) 50 Bom. L. R. 245.

² *Alagappa Chettiyar v. Ko Kala Pai*, [1940] Ran. 199; *Shamu Patter v. Abdul Kadir Ravuthan*, (1912) 35 Mad. 607, 39 I. A. 218, 14 Bom. L. R. 1034.

³ *Lachman Singh v. Surendra Bahadur Singh*, (1932) 54 All. 1051, F.B.

⁴ *Nainsukhdas Sheonarayan Shop v. Goverdhandas*, [1947] Nag. 510.

⁵ *Rao Bhimsingh v. Fakirchand*, [1947] Nag. 649.

⁶ *Amir Husain v. Abdul Samad*, [1937] All. 723.

⁷ *Badri Prasad v. Abdul Karim*, (1913) 35 All. 254; *Ram Bahadur Singh v. Ajodhya Singh*, (1916) 20 C. W. N. 699 (Patna); *Dalichand v. Lotu*, (1919) 22 Bom. L. R. 136, 44 Bom. 405; *Amardas Mangaldas v. Harmanbhai Jethabhai*, (1942) 44 Bom. L. R. 643.

⁸ *Paramasiva Udayan v. Krishna Padayachi*, (1917) 41 Mad. 535.

⁹ *Jagannath Khan v. Bajrang Das Agarwala*, (1920) 48 Cal. 61; *Avinash Chandra Bidyanidhi Bhattacharya v. Dasarath Malo*, (1928) 56 Cal. 598.

contrary. The Rangoon High Court has held that the writer of a document may perform a dual role; he may be an attesting witness as well as the writer. When a man places his signature upon a document and at the same time describes himself as the writer thereof, the inference is that he signs as the writer and nothing else, but, as a matter of fact, it can be shown that he signed not only as the writer but also as a witness of the fact that he saw the document executed or received a personal acknowledgment from the executant that he had executed it.¹ The Bombay High Court has further held that where the writer has signed not as a scribe but as an attesting witness the attestation is good.² Where the only available attesting witness to a mortgage deed denies his attestation, it is permissible to prove the deed by calling its writer under s. 71 to depose to the execution of the deed by the mortgagor and to its attestation by the two witnesses.³

The direct evidence of the attester will be "primary evidence". If there is no attesting witness alive, then the document must be proved in the manner provided by ss. 47 and 73.

Documents requiring attestation.—(1) A will (ss. 57 and 63 of the Indian Succession Act, 1925); (2) a mortgage, the principal money secured by which is Rs. 100 or upwards (Transfer of Property Act, s. 59); (3) a gift of immoveable property (Transfer of Property Act, s. 132).

3. 'It shall not be used in evidence'.—These words mean that the document cannot be used in a suit for enforcement of the document, leaving the ordinary provisions of law in s. 67 to apply where the document is to be used for any other purpose. Although a document cannot be used in evidence as a mortgage deed, which requires attestation, yet this section does not prevent it from being used in evidence for the purpose of proving it as an acknowledgment saving limitation.⁴

4. 'Until one attesting witness at least has been called for the purpose of proving its execution'.—The word 'called' means tendered for the purpose of giving evidence.⁵ It is not necessary for the attesting person, in order to prove execution, to point to the signature or mark made by the executant. It does not therefore follow that because a witness is unable to point to the signature on a document of the person whose signature he purports to have attested, he has failed to prove that signature.⁶

This section does not say that a document required to be attested by two witnesses shall be proved by the evidence of one of them. All that it provides is that such a document shall not be accepted in evidence unless the evidence of at least one of the attesting witnesses is called. The words "at least" presuppose that more evidence may be required and it can only be by reference to the circumstances of each case that the quantum of evidence necessary to discharge the onus of proof can be measured. A will duly signed by the testator and attested by two witnesses, who attest not in the presence of each other but at different times on the acknowledgment by the testator of his own signature, cannot be admitted to proof on the evidence of only one of the attesting witnesses.⁷

¹ *Alagappa Chettiyar v. Ko Kala* [1939] All. 366.
Pai, [1940] Ran 199.

² *Yacubkhan v. Guljarkhan*, (1927) 52 Bom. 219, 30 Bom. L. R. 565.

³ *Lakshman v. Krishnaji*, (1927) 29 Bom. L. R. 1425.

⁴ *Shyam Lal v. Lakshmi Narain*,

⁵ *Moti Chand v. Lalta Prasad*, (1917) 40 All. 256.

⁶ *Riazulnisa Begam Mst. v. Lala Puran Chand*, (1943) 19 Luck. 443.

⁷ *Roda Framroze v. Kanta Varjivan-das*, (1945) 47 Bom. L. R. 709.

In England, in virtue of s. 3 of the Evidence Act, 1938,¹ a document to the validity of which attestation is requisite may be proved in the manner in which it might be proved if no attesting witness were alive.

5. **Proviso.**—The proviso was added by Act XXXI of 1926. It simplifies the difficulty of calling attesting witnesses where the document to be proved is a registered one and is not a will and its execution is not specifically denied by the person executing it.² If the attestation is not specifically denied it is not necessary to call any attesting witness.³

The words “specifically denied” mean specifically denied by the party against whom it is sought to be used and not only by the executant. Where, therefore, a party against whom a document is sought to be used denied its execution, even though the executant does not do so, it is necessary to call an attesting witness to prove it.⁴ A third party who is a party to a mortgage suit but not to the mortgage deed can deny execution and require proof of attestation when the executant of the deed admits execution.⁵

The Madras High Court has held that the proviso has a retrospective effect as it relates to processual law and not to substantive law. If the execution of a deed required to be attested by law is not denied by the executant, it need not be proved by any attesting witness, though it might have been executed before the enactment of the proviso.⁶

6. **‘Execution’.**—‘Execution’ means not only signing by the person executing the document but also the attestation of his signature by witnesses where it requires such attestation.⁷

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Proof where no attesting witness found.

COMMENT.—An attesting witness, if available, should be called in evidence. If the attesting witness is dead, or is living out of the jurisdiction of the Court or cannot be found after diligent search,⁸ or if the document purports to have been executed in the United Kingdom of Great Britain and Ireland, two things must be proved:

- (1) the signature of one attesting witness, and
- (2) the signature of the executant.

Where the executant of, and all the marginal witnesses to, a mortgage deed were dead, it was held that the mortgage deed was sufficiently proved by evidence

¹ 1 & 2 Geo. VI, c. 6.

² The following cases are affected by this proviso: *Veerappa Kavundan v. Ramasami Kavundan*, (1907) 30 Mad. 251; *Satish Chandra Mitra v. Jogendranath Mahalanabis*, (1916) 44 Cal. 345.

³ *Yacubkhan v. Guljarkhan*, (1927) 52 Bom. 219, 30 Bom. L. R. 565; *Hari Nath Ghosh v. Nepal Chandra Ray Chaudhuri*, [1937] 1 Cal. 507; *Sheo Ratan Singh v. Jagannath*, (1936) 12 Luck. 681.

⁴ *Chandra Kali v. Bhabuti Prasad*, (1943) 19 Luck. 365.

⁵ *Syed Zaharul Hussein v. Mahadeo*, [1948] Nag. 621.

⁶ *Thayammal v. Mutukumaraswami Chettiar*, (1929) 53 Mad. 119.

⁷ *Hari Nath Ghosh v. Nepal Chandra Ray Chaudhuri*, [1937] 1 Cal. 507.

⁸ *Mussammatal Shahzadi Begum v. Syed Muhammad Qasim*, (1928) 7 Pat. 312. In this case the effect of the proviso to s. 68 was not brought to the notice of the Court.

that the signature of the mortgagor was in his handwriting and that the signatures of two of the marginal witnesses were in their handwriting.¹

Admission of execution by party to attested document.

70. The admission¹ of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

COMMENT.—This section serves as a proviso to s. 68.

The effect of this section is to make the admission of the executant a sufficient proof of the execution of a document as against the executant himself,² even though it may be a document attestation of which is required by law.³ The document is not for that reason binding on other persons.⁴ An attested document means a duly attested one, and the execution that is contemplated in this section is a due execution or execution in accordance with what the law requires for a particular document; so, if a question of attestation is put in issue, it is incumbent on the plaintiff to prove that the document has been duly attested before this section can be relied on.⁵

Scope.—This section operates only where the person relying on a document has not given any evidence at all of due execution of the document by the executant but relies on an admission of execution by the latter. So that if a mortgagor admits execution of a document in the written statement, it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. It is only in cases where it appears on the face of a document or it is positively made out by the evidence on the record that a document required by law to be attested has not been attested in accordance with law that this section cannot be made applicable in spite of the admission of a party to an attested document of its execution by himself for the simple reason that a Court cannot shut its eyes to obvious facts appearing on the face of a document or on the surface of the record.⁶

1. 'Admission'.—The admission here spoken of relates only to the execution. It must be distinguished from the admissions mentioned in ss. 22 and 65(b) which relate to the contents of a document.

The Calcutta and the Allahabad High Courts have held that the word 'admission' relates only to the admission of a party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. In other words, it has no relation to any admission of execution made before an attesting witness without reference to any suit or proceeding.⁷ But the Patna and the Rangoon High Courts have laid down that an admission under this section is admissible in evidence even though it be an admission not made in the course of legal proceedings pending before a Court of Justice, but which may be an admission made antecedent to the institution of legal proceedings.⁸ The Madras High Court

¹ *Uttam Singh v. Hukam Singh*, (1916) 39 All. 112.

² *Jagannath v. Rawji*, (1922) 24 Bom. L. R. 1296, 47 Bom. 137.

³ *Asharfi Lal v. Musammat Nannhi*, (1921) 44 All. 127; *Raja Ram v. Thakur Rameshwar Bakhsh Singh*, (1936) 12 Luck. 109.

⁴ *Arjun Sahu v. Kelai Rath*, (1922) 2 Pat. 317.

⁵ *Davood Rowther v. Ramanathan Chettiar*, [1938] Mad. 523.

⁶ *Raja Ram v. Thakur Rameshwar*

Bakhsh Singh, (1936) 12 Luck. 109.

⁷ *Abdul Karim v. Salimun*, (1899) 27 Cal. 190; *Raj Mangal Misir v. Mathura Dubain*, (1915) 38 All. 1. See *Asharfi Lal v. Musammat Nannhi*, (1921) 44 All. 127.

⁸ *Nageshwar Prasad v. Bachu Singh*, (1919) 4 P. L. J. 511, doubted in *Musammat Hira Bibi v. Ramdhan Lal*, (1921) 6 P. L. J. 465; *Aung Rhi v. Ma Aung Krwa Pru*, (1923) 1 Ran. 557.

has adopted the view of the Calcutta and the Allahabad High Courts and held that the admission within the meaning of this section must be an admission made for the purpose of or having reference to the cause either in the pleadings or during the course of the trial.¹

While it is not in all cases that an admission of the executant binds his successors in interest for the purposes of this section, but the admission is binding on the executant's successor in interest when the latter founds his title to the property in suit upon a document which contains such admission, for then he must be taken to have accepted it as correct.²

CASE.—In a suit to enforce a mortgage, it appeared that one of the executants was a pardanashin woman who had signed the deed inside the parda, and that the persons who signed as attesting witnesses were outside the parda and did not see her affix the signature. At the trial she admitted having signed the deed. It was held that this section applied only to a document which was duly attested, and that as the mortgage deed was not attested within the meaning of s. 59 of the Transfer of Property Act, 1882, it was invalid as against her in spite of her admission.³

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

COMMENT.—Principle.—Where an attesting witness has denied all knowledge of the matter, the case stands as if there was no attesting witness, and the execution of the document may be proved by other independent evidence.⁴ This section only operates if the attesting witness denies or does not recollect the execution of the document. Under it execution of a document includes attestation.⁵

This section provides that if the attesting witness denies or does not recollect the execution of the document its execution may be proved by other evidence. This is a sort of a safeguard introduced by the Legislature to the mandatory provisions of s. 68, where it is not possible to prove the execution of the will by calling attesting witnesses, though alive. This section can only be requisitioned when the attesting witnesses who have been called fail to prove the execution of the will by reason of either their denying their own signatures, or denying the signature of the testator, or having no recollection as to the execution of the document. The section has no application when one attesting witness has failed to prove the execution of the will and other attesting witnesses are available who could prove the execution if they were called.⁶

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

COMMENT.—Principle.—Where the law does not require attestation for the validity of a document, it may be proved by admission or otherwise, as though no attesting witnesses existed.

¹ *Davood Rowther v. Ramanathan Chettiar*, [1938] Mad. 523, 532.

² *Chandra Kali v. Bhabuti Prasad*, (1943) 19 Luck. 365.

³ *Hira Bibi v. Ram Hari Lall*, (1925) 5 Pat. 58, 27 Bom. L. R. 1144, 52 I. A. 362.

⁴ See *Lakshman v. Krishnaji*, (1927) 29 Bom. L. R. 1425.

⁵ *Lakshman Sahu v. Gokhul Maharana*, (1921) 1 Pat. 154.

⁶ *Vishnu Ramkrishna v. Nathu Vitthal*, (1948) 50 Bom. L. R. 245.

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made,¹ any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person² may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger-impressions.

COMMENT.—Principle.—The Court may compare the disputed signature, writing, or seal of a person with signatures, writings or seals which have been admitted or proved to the satisfaction of the Court to have been made or written by that person. A Court may rely upon its own comparison of the signature, writing, or seal, unaided by expert evidence.¹

Handwriting can be proved in the following ways :—

- (1) By proof of signature and handwriting of the person alleged to have signed or written the document (s. 67) :
- (2) By the opinion of an expert who can compare handwritings (s. 45) :
- (3) By a witness who is acquainted with the handwriting of a person by whom it is supposed to have been written and signed (s. 47) :
- (4) By comparison of signature, writing or seal with others admitted or proved (s. 73).

1. 'By whom it purports to have been written or made'.—According to the Bombay High Court this expression means by whom it is alleged to have been written or made.² The Calcutta High Court has construed it to mean that the writing which is in dispute must itself in terms express or indicate that it was written by the person to whom the writing is attributed. It has observed that the section "does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made... shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard... must purport to have been written by the same person, that is to say, the writing itself must state or indicate that it was written by that person... a comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts."³

According to the Bombay view when an anonymous writing is produced and ascribed by the prosecution to a particular person, the case for the prosecution must be taken to be that having regard to the admitted documents, and the com-

¹ *Abdul Subhan Khan alias Khalil-ur-Rahman v. Nusrat Ali Khan*, (1936) 12 Luck. 606 ; *Pakala Narayana Swamy v. King-Emperor*, (1937) 17 Pat. 15.

² *Emperor v. Ganpat Balkrishna*,

(1912) 14 Bom. L. R. 310.

³ *Barindra Kumar Ghose v. Emperor*, (1909) 37 Cal. 467, 502, 503. See *Sarojini Dasi v. Hari Das Ghose*, (1921) 49 Cal. 235 ; *Khajiruddin Sonar v. Emperor*, (1925) 53 Cal. 372.

parison between them and the disputed writing, the prosecution alleges that the disputed document purports to have been written or made by the accused.¹

2. 'Signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person'.—Where such signature, writing or seal on a particular document is not proved or admitted to be genuine, it cannot be legitimately used for comparing it with the signature, writing or seal on other documents.²

Specimen signatures and writings made by an accused person while he is in the custody of the police and while the police are investigating into the offence, are admissible in evidence at the trial of the accused for the offence of forgery.³

Under clause 3 of the section a Court has power to direct an accused person, present in Court to make his finger impression for the purpose of comparison with another impression supposed to have been made by him.⁴

In order to secure evidentiary value to footmarks, it is not enough to show that the footmarks tally with the shoes of the accused. The evidence must go further and show that the marks have some peculiarity which is found in the shoes of the accused and will not be found in most other shoes.⁵

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents:—

- (1) documents forming the acts or records of the acts¹—
 - (i) of the sovereign authority;
 - (ii) of official bodies and tribunals, and
 - (iii) of public officers, legislative, judicial and executive, of any part* of Her Majesty's dominions, or of a foreign country.
- (2) public records kept in any Province* of private documents.²

COMMENT.—Documents are divided into two categories: public and private.

This section states what comes in the category of public documents. Section 75 states that all other documents are private.

Certain modes of proof are prescribed in regard to public documents as distinguished from private documents.

Sections 74-78 deal with (a) the nature of public documents, and (b) the proof which is to be given of them. Section 74 defines their nature; and ss. 76-78 deal with the exceptional mode of proof applicable in their case. The proof of private documents is subject to the general provisions of the Act relating to the proof of documentary evidence contained in ss. 71-73.

"There are several exceptions to the rule which requires primary evidence to be given...The most important and conspicuous exception, however, is with respect to the proof of records, and other public documents of general concernment; the objection to producing which rests on the ground of moral, not physical

¹ *Emperor v. Ganpat Balkrishna*, (1912) 14 Bom. L. R. 310.

² *Sri Prasad v. Special Manager, Court of Wards, Balrampur Estate*, (1936) 12 Luck. 400.

³ *Emperor v. Ramrao Mangesh*, (1932) 56 Bom. 304, 34 Bom. L. R. 598.

⁴ *King-Emperor v. Tun Hlaing*,

(1923) 1 Ran. 759, F.B.; *Zahuri Sahu v. King-Emperor*, (1927) 6 Pat. 623.

⁵ *Emperor v. Bhikha Gober*, (1943) 45 Bom. L. R. 884.

* As amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

inconvenience. They are, comparatively speaking, liable to corruption, alteration, or misrepresentation,—the whole community being interested in their preservation, and, in most instances, entitled to inspect them; while private writings, on the contrary, are the objects of interest but to few, whose property they are, and the inspection of them can only be obtained, if at all, by application to a court of justice. The number of persons interested in public documents also renders them much more frequently required for evidentiary purposes; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use would soon insure their destruction. For these and other reasons the law deems it better to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of errors arising from inaccurate transcription, either intentional or casual. But, true to its great principle of exacting the best evidence that the nature of the matter affords, the law requires this derivative evidence to be of a very trustworthy kind, and has defined, with much precision, the forms of it which may be resorted to in proof of the different sorts of public writings.”¹

Public documents form an exception to the hearsay rule and their admissibility rests on the ground that the facts contained therein are of public interest and the statements are made by authorised and competent agents of the public in the course of their official duty.

1. ‘Documents forming the acts or records of the acts’.—“The word ‘acts’ in the phrase ‘documents forming the acts or records of the acts’ is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document. The kind of acts which section 74 has in view is indicated by section 78. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character. The inquiries which a public officer may make, whether under the Criminal Procedure Code or otherwise, may or may not result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specific act in which they may result. It is to the latter only . . . that section 74 was intended to refer.”²

A document which purports to be a letter or report of an executive official is not a public document.³

Executive officer.—A school master comes within the purview of ‘executive officer’ and a copy of a certificate given by him is admissible in evidence if properly certified.⁴

2. ‘Public records kept in any Province of private documents’.—This clause refers to public records of original wills and of registered documents. According to the Bombay High Court an income-tax return is not a public document or a public record of a private document.⁵ Similarly, the Calcutta High Court has held that certified copies of assessment or dues and order sheets are inadmissible in evidence.⁶ The Madras High Court has held that an income-tax return or a

¹ Best, 12th Edn., ss. 484, 485, pp. 407-409.

² *Queen-Empress v. Arumugam*, (1897) 20 Mad. 189, 197, F.B.

³ *Fazl Ahmad v. Crown*, (1913) P. R. No. 1 of 1914 (Cr.).

⁴ *Maharaj Bhamudas v. Krishnabai*, (1926) 28 Bom. L. R. 1225, 50 Bom. 716.

⁵ *Devidatt v. Shriram*, (1931) 34 Bom. L. R. 236, 56 Bom. 324. Same is the view of the Rangoon High Court: *Anwar Ali v. Tafazol Ahmed*, (1924) 2 Ran. 391.

⁶ *Pramatha Nath Pramanik v. Nirode Chandra Ghosh*, [1939] 2 Cal. 394.

statement filed in, support of it is a public document and certified copies will be admissible under s. 65 (e).¹

Private documents.

75. All other documents are private.

COMMENT.—Documents which are not public documents are private documents, e.g., contracts, leases, mortgage-deeds, etc.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

COMMENT.—This section provides the means of proof of public documents which any person has a right to inspect. There is a common law right of a person to take inspection of a document in which that person is interested for the protection of such interest.²

The section requires that the copy of a public document given by a public officer should bear a certificate written at the foot of such copy that it is a true copy of such document. Where a copy bears no certificate and it is not supported by the evidence of the person who prepared it, it is not admissible in evidence.³

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

78. The following public documents may be proved as follows:—

(1) Acts, orders or notifications of the Central Government in any of its departments, or of the Crown Representative or of any Provincial Government or any department of any Provincial Government—

by the records of the departments, certified by the heads of those departments, respectively,

or by any document purporting to be printed by order of any such Government or, as the case may be, of the Crown Representative:

(2) the proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of the Government concerned:

(3) proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

¹ *Rama Rao v. Venkataramayya*, (1941) 43 Bom. L. R. 961.

[1940] Mad. 969, F.B.

³ *Khadim Ali v. Jagannath*, (1940)

² *Shamdasani v. Sir Hugh Cocke*, 16 Luck. 230.

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer :

(4) the Acts of the Executive or the proceedings of the Legislature of a foreign country,—by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some Central Act ;

(5) the proceedings of a municipal body in a Province,*—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body :

(6) public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

COMMENT.—This section specifies the various ways in which the contents of a public document can be proved.

The word 'may' is used only as denoting a mode of proof other than the ordinary one, namely, the production of the original. For, when the original is a public document within the meaning of s. 74, a certified copy of the document, but no other kind of secondary evidence, is admissible.

This section does not appear to have the effect of absolving the parties from any rules governing the proof of the facts on which they desire to rely. It is to be observed that the section does not say how any fact, historical or otherwise, is to be proved by the parties, but gives the Court liberty to resort for its aid to appropriate books or documents of reference on matters of public history.¹ The proceedings of Parliament may be proved under cl. (2) by the Journals of the House of Commons or by copies purporting to be printed by order of the Government.²

The Calcutta High Court has held that a Court is not bound to have recourse exclusively to the mode of proof in respect of published documents set out in this section. This is a permissive and not an exclusive section.³ On a point of limitation it adopted the version contained in the published Act and not that contained in the Gazette.⁴ The Lahore High Court has, on the other hand, held that the text published in the Gazette must be taken to be the authorized text of the Limitation Act under cl. (2) of this section.⁵

PRESUMPTIONS AS TO DOCUMENTS.

79. The Court shall presume to be genuine* every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government, or of

Presumption as to genuineness of certified copies.

* As amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

¹ "The Englishman," Ltd. v. Lajpat Rai, (1910) 37 Cal. 760.

² Ibid.

³ *Seodoyal Khemka v. Joharmull Mannull*, (1923) 50 Cal. 549, 560.

⁴ Ibid.

⁵ *Gobind Das v. Rup Kishore*, (1923) 4 Lah. 367.

a Provincial Government, or by any officer in an Acceding State or other Indian State who is duly authorised thereto by the Central Government.*

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

COMMENT.—Sections 79 to 90 deal with certain presumptions as to documents.

This section proceeds upon the maxim *omnia præsumentur rite esse acta* (all acts are presumed to be rightly done). In fact all the following sections down to s. 90 inclusive, are illustrations of, and founded upon, this principle. But though the Courts are directed to draw a presumption in favour of official certificates, it is not a conclusive presumption, it is rebuttable. It is but a *prima facie* presumption, and if the certificate, etc., be not correct, its correctness may be shown. On the same maxim stands the last clause of this section. It is very old law that where a person acts in an official capacity it shall be presumed that he was duly appointed.¹

This section applies to certificates, certified copies or other documents which are duly certified by an officer of the Central Government or of a Provincial Government or by an officer in an Acceding State or other Indian State who is authorised by the Central Government to be genuine.

Where a document, purporting to be a certified copy of a record of evidence, is produced, it must be presumed, under this section, to be an accurate copy of the record of evidence. This presumption is liable to be rebutted. This section imperatively directs the Court to raise presumption. The terms of s. 114 are only permissive. The words 'shall presume' indicate that if no other evidence is given the Court is bound to find that the facts mentioned in the section exist. They occur in ss. 79-85 and s. 89. These sections are, therefore, mandatory.

A certificate granted by a Head Master of a school in an Indian State and duly certified by the Resident or Political Agent is admissible in evidence.²

Clause 2.—Where a letter purporting to be issued from the Chief Secretary to the Government of Bengal was signed by a Deputy Secretary, not in his official capacity, but "for the Chief Secretary," it was held that there was no legal proof that the Local Government had ordered or authorized a prosecution under s. 196 of the Criminal Procedure Code. The presumption under this section would have arisen if the letter had been signed by the Chief Secretary himself.³

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding¹ or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate,² or by any such officer as aforesaid, the Court shall presume—

Presumption as to documents produced as record of evidence.

* As amended by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

¹ Norton, 260-261.

² *Bhanudas v. Krishnabai*, (1926) 50 Bom. 716, 28 Bom. L. R. 1225.

³ *Oziullah v. Beni Madhab Chowdhuri*, (1922) 50 Cal. 135.

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

COMMENT.—The presumptions to be raised under this section are considerably wider than those under s. 79. They embrace not only the genuineness of the document, but that it was duly taken and given under the circumstances recorded in the document. The presumptions under this section are not conclusive; they may be rebutted.

The section is applicable (a) to a document which purports to be a record or memorandum of the evidence given by a witness in a judicial proceeding or before any official authorised by law to take such evidence, and (b) to a statement or confession by an accused person, taken in accordance with law, and signed by any Judge or Magistrate.

The section dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law. If a document has not been taken in accordance with law, this section does not operate to render it admissible. The section merely gives legal sanction to the maxim "*Omnia proesumuntur rite esse acta*" with regard to documents taken in the course of a judicial proceeding.¹ The depositions and statements may be proved by the production of the document without any witness being called to prove it.² Where, for instance, a confession is reduced to writing by a Magistrate in accordance with the provisions of the Criminal Procedure Code, the record is admissible in evidence without further proof.³ The Court will presume that a confession was duly recorded and that the circumstances under which the confession was recorded were such as had been set down in the record made by the Magistrate. It says nothing about there being any presumption regarding the voluntariness of the confession.⁴ A dying declaration, which has been recorded by a Magistrate, can be tendered in evidence without the Magistrate who recorded it being called.⁵ When a deposition is taken in open Court or a confession is taken by a Magistrate, there is a degree of publicity and solemnity, which affords a sufficient guarantee for the presumption that everything was formally, correctly and honestly done.

1. 'Evidence, . . . given by a witness in a judicial proceeding'.—See s. 33. This section will not apply to any statement failing to satisfy the provisions of s. 33.

A deposition given by a person is not admissible in evidence against him in a subsequent proceeding without its being first proved that he was the person examined and gave the deposition. A pardon was tendered to an accused, and his evidence was recorded by a Magistrate. Subsequently the pardon was revoked, and he was put on his trial before the Sessions Judge along with the other accused. At the trial the deposition given by him before the Magistrate was put in and used in evidence against him without any proof being given that he was the person who was examined as a witness before the Magistrate. It was held that the deposition

¹ *Queen-Empress v. Viran*, (1886) 9 Mad. 224, 227. See *Hashim v. The Empress*, (1900) P. R. No. 9 of 1900 (Cr.).

² *Emperor v. Surajbali*, (1933) 56 All. 750.

³ *Kheman v. The Crown*, (1924) 6

Lah. 58; *Nga San Baw v. The Crown*, (1902) 1 L. B. R. 340, F.B.

⁴ *Emperor v. Thakur Das Malo*, [1943] 1 Cal. 487.

⁵ *Emperor v. Surajbali*, (1933) 56 All. 750.

was inadmissible without proof being given as to the identity of the accused with the person who was examined as a witness before the Magistrate.¹

2. 'Taken in accordance with law, and purporting to be signed by any Judge or Magistrate'.—If particular provisions of law in recording evidence are not fully complied with, this section does not operate. Thus omission to read over to a witness his deposition, in accordance with O. XVIII, r. 5, of the Civil Procedure Code, renders the same inadmissible in evidence against him on his subsequent trial for perjury.² Where a confession, made before a Magistrate, did not bear his certificate, stating his belief that it was freely and voluntarily made, as required by s. 164(3) of the Criminal Procedure Code, it was held that it could not be admitted under this section without proof of its having been made.³

A confession made by an accused before a Magistrate in an Indian State cannot be admitted in evidence under this section. The Magistrate recording the confession must be examined to prove all the confession before it can be used as evidence.⁴ Where such is not the case, it is not necessary that the recorder of a confession should always be examined.⁵

81. The Court shall presume the genuineness of every document purporting to be the London Gazette or any Official Gazette, or the Government Gazette of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

COMMENT.—Principle.—Government Gazettes or newspapers or journals or copies of private Acts of Parliament printed by the King's Printer are *prima facie* proof of their genuineness.

A catalogue which embodies a statement of the firm regarding the price at which it is prepared to sell its articles is not hearsay and is admissible in evidence in proof of the price.⁶

As to the meaning of the expression "proper custody" see the Explanation to s. 90, *infra*.

As to the relevancy of statements in a Gazette, see s. 37.

The second part of this section includes most of the documents which contain matters referred to in s. 35 and which are declared to be public documents by s. 74.

¹ *Queen-Empress v. Durga Sonar*, (1885) 11 Cal. 580.

² *Emperor v. Nabab Ali Sarkar*, (1923) 51 Cal. 236, following *Jyotish Chandra Mukerjee v. Emperor*, (1909) 36 Cal. 955, and *Emperor v. Jogendra Nath Ghose*, (1914) 42 Cal. 240, distinguishing *Ramesh Chandra Das v. Emperor*, (1919) 46 Cal. 895, and disapproving *Elahi Baksh Kazi v. Emperor*, (1918) 45 Cal. 825.

³ *The Emperor v. Radhe Halkoti*, (1902) 7 C. W. N. 220. See *Nadir v. The Empress*, (1887) P. R. No. 36 of 1887 (Cr.).

⁴ *Emperor v. Dhanka Amra*, (1914) 16 Bom. L. R. 261.

⁵ *Guja Majhi v. The King-Emperor*, (1917) 2 P. L. J. 80.

⁶ *Hasanali v. Darashah*, [1948] Nag. 922.

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

COMMENT.—This section enables the Courts in British India to recognise presumptions with regard to certain classes of documents which are recognized in English Courts. The Court must presume (a) that the seal or stamp or signature is genuine; and (b) that the person signing the document held, at the time when he signed, the judicial or official character he claims. Documents which, without proof of the seal or signature, or of the official character of the person by whom they purport to have been signed, are admissible in England, will be admissible in British Courts in India.

83. The Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any Provincial Government* were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

COMMENT.—The presumption as to accuracy is limited only to maps or plans made under the authority of Government.¹ Such maps or plans contain the results of inquiries made under competent public authority. In all other cases proof of accuracy is needed. This section must be read with s. 36, which deals with statements in maps, charts and plans. These are provable under ss. 77 and 79 by the production of certified copies.

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong; but, in the absence of evidence to the contrary, they may be properly judicially received in evidence as correct when made.²

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

* As amended by Act XL of 1949, s. 3. *Chimanlal Jamnadas*, (1941) 44 Bom. L. R. 295, [1942] Bom. 357.

¹ *Rahmat-ulla Khan v. Secretary of State for India*, (1913) P. R. No. 63 of 1913 (Civil); *Secretary of State v. Jagudindra*, (1902) 5 Bom. L. R. 1, 30 I. A. 44, 30 Cal. 291.

COMMENT.—This section should be read along with s. 38, which makes relevant statements as to any law and rulings contained in officially printed books of any country. It dispenses with the proof of the genuineness of authorized books of any country containing laws and reports of decisions of Courts. Section 57 authorizes the Courts to take judicial notice of the existence of all laws and statutes in the Provinces and in the United Kingdom. Section 74 recognizes statutory records to be public records. Section 78 lays down the method of proving the statute passed by the Legislature.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Central Government, was so executed and authenticated.

Presumption as to powers-of-attorney.

COMMENT.—**Principle.**—The Court shall presume the due execution and authentication of a power-of-attorney when executed before and authenticated by a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, etc. The section does not exclude other legal modes of proving the execution of a power-of-attorney.¹

‘Power-of-attorney’ includes any instrument empowering a specified person to act for and in the name of the person executing it (Indian Stamp Act, s. 2(21)).

A ‘notary public’ is an officer who takes notes of anything which may concern the public; he attests deeds or writings to make them authentic in another country; but is principally employed in mercantile affairs, as to make protests of bills of exchange, etc.² Under s. 138 of the Negotiable Instruments Act (XXVI of 1881), the Central Government is authorised to appoint notaries public within any local area.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty’s dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Presumption as to certified copies of foreign judicial records.

An officer who, with respect to any territory or place not forming part of Her Majesty’s dominions, is a Political Agent therefor, as defined in section 3, clause (40), of the General Clauses Act, 1897, shall, for the purposes of this section, be deemed to be a representative of the Central Government in and for the country comprising that territory or place.

COMMENT.—**Principle.**—If a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. It, however, does not exclude other proof, for, under ss. 65 and 66, secondary evidence may be given of public documents, without notice to the adverse party, when the

¹ In re *Sladen*, (1898) 21 Mad. 492.

² Wharton’s Law Lexicon, 14th

edn., p. 697.

person in possession of documents is out of the reach of, or not subject to, the process of the Court.¹

This section contains an instance of documents which s. 65, cl. (f), seems to refer to.

The provisions of this section are imperative and must be complied with. In the absence of the certificate referred to in this section, the statements of witnesses taken in a Court of law in the Jaipur State were held to be not admissible in evidence although they were forwarded by the Resident in due course.²

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

Presumption as to books, maps and charts.

COMMENT.—Principle.—The Court may presume that any book to which it may refer for information on matters of public or general interest or any published chart or map, was written and published by the person, and at the time and place by whom or at which it purports to have been written or published. See ss. 36 and 88.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to telegraphic messages.

COMMENT.—Principle.—The Court may treat telegraphic messages received, as if they were the originals sent, with the exception, that a presumption is not to be made as to the persons³ by whom they were delivered for transmission and, unless the non-production of the originals is accounted for, secondary evidence of their contents is inadmissible. It must be proved that the message had been forwarded from the telegraphic office to the person to whom such message purports to have been addressed. In the absence of such evidence, the telegram cannot be held to have been proved.

The Court is forbidden to make any presumption as to the person by whom the telegram was sent.

The section enables the Court to accept the hearsay statement as evidence of the identity of the message delivered with that handed in.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Presumption as to due execution, etc., of documents not produced.

¹ *Haranund v. Ram Gopal*, (1899)
2 Bom. L. R. 562, 27 I. A. 1, 27 Cal.
639; *Vallabhdas v. Pranshankar*, (1926)
30 Bom. L. R. 1519.

² *Murli Das v. Achut Das*, (1923)
5 Lah. 105.

³ *Emperor v. Abdul Gani*, (1925)
27 Bom. L. R. 1373, 49 Bom. 878.

COMMENT.—Principle.—When a document is called for and not produced after proper notice so to do, the Court shall presume that it was duly attested, stamped and executed in the manner prescribed by law. The section refers only to stamp, execution and attestation of documents. It is restricted to cases where notice to produce a document is given to a party. Where a document is shown to have remained unstamped for some time after its execution, the party who relied on it must prove it to have been duly stamped.

90. Where any document, purporting or proved to be thirty years old,¹ is produced from any custody which the Court in the particular case considers proper, the Court may presume² that the signature³ and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. This explanation applies also to section 81.

ILLUSTRATIONS.

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land, showing his titles to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody. The custody is proper.

COMMENT.—Object.—The object of this section is not to make it too difficult for persons relying upon ancient documents to utilize those documents in proving their cases. It is intended to do away with the insuperable difficulty of proving the handwriting, execution, and attestation of documents in the ordinary way after the lapse of many years.

Principle.—When a document is or purports to be more than thirty years old, if it be produced from what the Court considers to be proper custody, it may be presumed (a) that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and (b) that it was duly executed and attested by the person by whom it purports to be executed and attested.¹ It is not necessary that the signatures of the attesting witnesses or of the scribe be proved, for if everything was proved there would be no need to presume anything.² There can, however, be no presumption as to who the person who executed the document is and what authority he

¹ *Ekcowree Singh Roy v. Kylash* (1868) 5 B. H. C. (A. C. J.) 135.
Chunder Mookerjee, (1873) 21 W. R. ² *Raghubir Singh v. Thakurain Sukh-*
 45; *Hari Dhangar v. Biru Dasru, raj Kuar*, (1938) 14 Luck. 393.

had to execute the document,¹ and whether he had the requisite authority,² or whether the contents of the document are true.³

The presumption allowed by this section is not a presumption which the Court is bound to make, and the Court may require the document to be proved in the ordinary manner.⁴ It is in the discretion of a Court whether it will raise the presumption in favour of a document for which this section provides, but this discretion is not to be exercised arbitrarily; it must be governed by principles, which are consonant with law and justice. And while on the one hand great care is requisite in applying the presumption, on the other hand it is clear that very great injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons. "Because a document purports to be an ancient document and to come from proper custody, it does not, therefore, follow that its genuineness is to be assumed. If there are reasonable grounds for suspecting its genuineness, and the party relying upon it fails to satisfy the Court of its due execution, there is an end of it. But if no such grounds exist, and it satisfies the conditions prescribed by s. 90 of the Indian Evidence Act, then proof of execution is dispensed with, and it is to be dealt with on the same footing as any other genuine instrument. If the authority or the title of the executant, for example, be not questioned, then effect is to be given to it as though he had the requisite authority or title. If either be questioned, then of course the person on whom the burden of proof lies must adduce evidence to satisfy the Court on the point, or he fails. When the genuineness of a document purporting to be an ancient document is put in issue, it appears to have been sometimes thought that any presumption in its favour is thereby excluded. But this would be to deprive the party producing it of the benefits of the presumption precisely in the circumstances in which he most stands in need of its aid. And there seems to be no difference in principle between cases in which due execution is traversed without more—those, that is, in which the party relying on the document is put to proof of it, and those in which it is alleged that the document is a forgery, except that in the latter case, the suspicions of the Court may be aroused by the nature of the plea. But in the one case, as in the other, the presumption merely takes the place of the evidence which would, where a modern document is concerned, be necessary for the purpose of proving due execution. The Court may decline to raise the presumption, in which case the party producing the document must fail, unless he is provided with evidence in support of it. But where the Court thinks proper to raise the presumption, it must be met and rebutted in the same way as direct evidence of the execution in the case of a modern document. The proper rule is... well stated by Mr. Taylor... He says (page 587, 8th Edition)—'An ancient deed, which has nothing suspicious about it, is presumed to be genuine without express proof, the witnesses being presumed dead, and if found in proper custody and corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof, it will be presumed to have constituted part of the actual transfer of the property therein mentioned, because this is the usual course of such transaction'.⁵

¹ *Sri Prasad v. Special Manager, Court of Wards, Balrampur Estate*, (1936) 12 Luck. 400.

² *Ram Naresh Singh v. Chirkut*, 1932 8 Luck. 18.

³ *Chandulal v. Bai Kashi*, (1938) 40 Bom. L. R. 1262, [1938] Bom. 97.

⁴ *Musammal Shafiq-un-nisa v. Raja*

Shaban Ali Khan, (1904) 6 Bom. L. R. 750, 26 All. 581, 31 I. A. 217; *Man-sukh v. Trikambhai*, (1929) 31 Bom. L. R. 1279; *Amrit v. Nur Muhammad*, (1902) P. R. No. 82 of 1902 (Civil).

⁵ Per Hill, J., in *Govinda Hazra v. Protap Narain Mukhopadhyay*, (1902) 29 Cal. 740, 747.

Before a Court is justified in making a presumption in favour of the genuineness of an ancient document it should be satisfied *aliunde* that there is good ground for accepting it as a true document.¹ If there are circumstances in the case which throw great doubt on the genuineness of a document more than thirty years old, even if it is produced from proper custody, the Court may exercise its discretion by not admitting that document in evidence without formal proof, and reject it when no such proof is given.²

Presumption as to signature of executant.—The presumption permitted by this section in the case of a document purporting to be thirty years old, that it was duly executed by the party by whom it purported to be executed, includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorised to sign for him.³

Presumption as to seal.—Under this section the presumption does not apply to a seal and hence no such presumption can be drawn in favour of a document which bears only a seal but neither any signature nor purports to be in the handwriting of any particular person.⁴

1. 'Document, purporting or proved to be thirty years old'.—The period of thirty years is to be reckoned not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof.⁵

A document dated August 3, 1888, was produced in Court on December 19, 1917, and its genuineness was not called in question up to August 12, 1918, when the first Court gave its judgment. It was only when the case came up to the appellate Court that the defendants took the objection that the document had not been proved. It was held that the period of thirty years should be reckoned from August 12, 1918, when the trial Court gave its decision, and the due execution of the document could therefore be presumed.⁶

The section applies to wills as to other documents and the Court may draw the presumption under it in deciding whether a will has been properly attested or not.⁷

In England, the period of thirty years has been reduced to twenty by the Evidence Act, 1938,⁸ s. 4.

Copy of document.—The presumption under this section can be raised only with regard to the original document if produced to the Court. It does not apply to a certified copy when the original document is not before the Court.⁹ The section requires the production to the Court of the particular document in regard to which the Court may make the statutory presumption. If the document produced is a copy, admitted under s. 65 as secondary evidence, and it is produced from proper

¹ *Jesa Lal v. Mussammatt Ganga Devi*, (1913) P. R. No. 81 of 1913 (Civil).

² *Musammatt Shafiq-un-nisa v. Khan Bahadur Raja Shaban Ali Khan*, (1904) 31 I. A. 217, 6 Bom. L. R. 750, 26 All. 581; *Charitar Raj v. Kailash Bishari*, (1918) 3 P. L. J. 306.

³ *Haji Sheikh Bodha v. Sukhrum Singh*, (1924) 47 All. 31, F.B.; *Balkaran Singh v. Dulari Bai*, (1926) 49 All. 55. *Contra, Mohammad Azim v. Special Manager, Court of Wards, Balrampur*, (1936) 12 Luck. 98.

⁴ *Maheswar Naik v. Tihayet Sailendra Narayan*, [1949] Cut. 312.

⁵ *Minu Sirkar v. Rhedoy Nath Roy*, (1879) 5 C. L. R. 135; *Surendra Krishna Roy v. Mirza Muhammad*, (1935) 63 I. A. 85, 38 Bom. L. R. 380.

⁶ *Ladha Singh v. Mst. Hukam Devi*, (1923) 4 Lah. 233.

⁷ *Mahendra Nath Surul v. Netai Charan Ghosh*, [1943] 1 Cal. 392.

⁸ 1 & 2 Geo. VI, c. 28.

⁹ *Vithoba Savlaram v. Shrihari*, (1944) 47 Bom. L. R. 116.

custody and is over thirty years old, then the signature authenticating the copy may be presumed to be genuine, but the production of a copy is not sufficient to justify the presumption of the execution of the original under this section.¹

2. 'May presume'.—The presumption is discretionary and not obligatory. Even if the elements mentioned in the section are satisfied, the Court may require the document to be proved in the ordinary manner. It is necessary for the Court to consider the evidence external and internal of the document in order to enable it to decide whether in any particular case it should or should not presume proper signature and execution. The Court may, but is not bound to, make the presumption merely because of the alleged age of the document.² The presumption being based on the rule of expediency, unless the surrounding circumstances satisfied the Court that the document was produced from proper custody it would be unsound to admit it.³ Where the Court chooses to make the presumption, no further proof of the facts is necessary under s. 69.⁴

3. 'Signature'.—Signature includes a mark, a mark being a sort of symbolic writing. The presumption of execution of a document under this section extends to a mark put on the document and it is taken to be the signature in the absence of proof to the contrary.⁵ The section makes no provision for any presumption in regard to seals, nor can a seal be regarded as a signature within the definition of the word contained in the General Clauses Act.⁶

Explanation.—'Proper custody' means the custody of any person so connected with the deed that his possession of it does not excite any suspicion of fraud.⁷ It is not necessary that the document should be found in the best and the most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody, and not on the history of the continuance. Possibly the origin of the custody was alone regarded as material because it is intelligible that ancient documents may be overlooked and left undisturbed notwithstanding a transfer of old, or creation of new, interests.⁸ In illustrations (a) and (b) the documents are produced from their natural place of custody, in (c) A's custody is proper under the circumstances. The provisions of the section read with the Explanation insist on a satisfactory account of the origin of the possession being given by the party relying upon the documents. The custody might not be in the strictest sense legal custody, but, whether it originated in right or wrong, the origin must be explained. The Court must, therefore, examine the surrounding circumstances tending to establish the connection of the party producing the document with the person with whom the documents should naturally have been.⁹

As to 'proper custody', Tindal, C. J., said: Documents found in a place in which, and under the care of persons with whom, (such) papers might naturally

¹ *Basant Singh v. Kunwar Brij Raj Saran Singh*, (1935) 62 I. A. 180, 37 Bom. L. R. 305, 57 All. 494; *Seethayya v. Subramania Somayajulu*, (1929) 56 I. A. 146, 31 Bom. L. R. 756, 52 Mad. 453; *Pandappa Mahalingappa v. Shivlingappa*, (1943) 47 Bom. L. R. 962; *Keolapati Alias Khurshed Johan Begam v. Harnam Singh Raja*, (1936) 12 Luck. 568.

² *Mansukh v. Trikambhai*, (1929) 31 Bom. L. R. 1279.

³ *Rudragouda v. Basangouda*, (1937) 40 Bom. L. R. 202.

⁴ *Mahendra Nath Surul v. Netai*

Charan Ghosh, [1943] 1 Cal. 392.

⁵ *Shailendranath Mitra v. Girija-bhushan Mukerji*, (1930) 58 Cal. 686.

⁶ *Special Manager, Court of Wards, Balrampur v. Tirbeni Prasad*, (1935) 11 Luck. 35; *Sri Prasad v. Special Manager, Court of Wards, Balrampur Estate*, (1936) 12 Luck. 400.

⁷ *Doe dem Neale v. Samples*, (1838) 8 Ad. & El. 151.

⁸ *Tajudin v. Govind*, (1902) 5 Bom. L. R. 144, 27 Bom. 452.

⁹ *Rudragouda v. Basangouda*, (1937) 40 Bom. L. R. 202.

and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it; "for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody there never would be any question as to their authenticity: but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various, and many that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody which is held sufficiently genuine to render a document admissible appears from all the cases".¹

CASES.—Proper custody.—Where a daughter professed to hold under a lease, more than thirty years old, in favour of her father, and was found to have been in possession of the land ever since her father's death for a period of forty years without interruption on the part of the father's heirs, it was held that the daughter's custody of the lease was a natural and proper custody within the meaning of this section.²

A person, who had obtained possession of a document, which would naturally come into his possession, failed to restore it after his right to possess it had ceased, and the document was produced from his custody. It was held that his failure to do so did not make the custody improper within the meaning of this section.³

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document,¹ and in all cases in which any matter is required by law to be reduced to the form of a document,² no evidence shall be given in proof of the terms of such contract, grant or other disposition

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.

of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

¹ *Bishop of Meath v. Marquess of Winchester*, (1836) 3 Bing. N. C. 183, 200.

² *Trailokia Nath Nundi v. Shurno Chungoni*, (1885) 11 Cal. 539; *Rajendra*

Prasad Bose v. Gopal Prasad Bose, (1924) 4 Pat. 67.

³ *Shama Charan Nandi v. Abhiram Goswami*, (1906) 33 Cal. 511.

Exception 2.—Wills admitted to probate in British India may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

ILLUSTRATIONS.

(a) If a contract is contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

COMMENT.—Principle.—When a transaction has been reduced to writing either by agreement of the parties or by requirement of law, the writing becomes the exclusive memorial thereof, and no evidence shall be given to prove the transaction, except the document itself or secondary evidence of its contents where such evidence is admissible. This rule is based on the principle that *the best evidence, of which the case in its nature is susceptible*, should always be presented. . . . This rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud, for, when better evidence is withheld, it is only fair to presume that the party has some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice.¹

Under this section

(1) when the terms of (a) a contract, (b) a grant, or (c) any disposition of property have been reduced to the form of a document; and

(2) where any matter is required by law to be reduced to the form of a document,

then (a) the document itself, or (b) secondary evidence of its contents, must be put in evidence.

¹ Taylor, 12th Edn., s. 391, p. 272. See *Entisham Ali v. Jamna Prasad*, 365, where secondary evidence of a sale-deed was admitted. (1921) 24 Bom. L. R. 675, 48 I. A.

The first provision refers to transactions voluntarily reduced to writing. The second refers to those cases in which any method is required by law to be reduced to the form of a document, e.g., sale of immovable property of the value of one hundred rupees and upwards, mortgage for an amount exceeding one hundred rupees, a lease of immovable property for a year at least, a trust of immovable property, a gift of immovable property,¹ etc.

There are two exceptions to these provisions :

(1) When a public officer is required by law to be appointed in writing, and any officer has acted as such, the writing need not be proved ;

(2) wills admitted to probate in British India may be proved by the probate.

The general rule laid down in this section is also subject to the exceptions laid down in the following ss. 95 to 99. The section has no application when the writing is not evidence of the matter reduced to writing.

Scope.—This section and s. 92 define the cases in which documents are exclusive evidence of transactions which they embody. They only apply when the document evidencing a contract appears to contain all the terms thereof. The inference whether a writing was intended to contain the whole agreement may be drawn from the document itself as well as from extrinsic evidence.² Sections 93-100 provide for the interpretation of documents by oral evidence.

1. 'When the terms...have been reduced to the form of a document'.—If parties have reduced all the terms of a contract or of a grant or of any disposition of property into writing, then no parole evidence is admissible, but if they intended only to reduce to writing a portion of the terms of the contract, then they are entitled to give parole evidence of the terms which they did not intend to reduce to writing.³ Where parties to a contract agree to substitute a written instrument for an oral contract the ultimate contract is deemed to be contained in the instrument alone and no oral evidence of its terms can be given thereafter.⁴ This section excludes oral evidence as to the terms of a written contract. There is nothing to exclude oral evidence that there was no agreement between the parties and, therefore, no contract.⁵

Illustration (b) refers to the first part of the section.

A wakf can be created orally under Muhammadan law, but when the terms of a dedication are reduced to the form of a writing, no evidence can be given to prove the terms except the document itself or secondary evidence thereof.⁶

Under English law, in an action on a written contract, oral evidence is admissible to show that the party liable on the contract contracted for himself and as the agent of his partners. Such partners are liable to be sued on the contract, though no allusion is made to them in it. This is also the law in India as there is nothing in this section to show that the Legislature intended to depart from this settled

¹ See *Chowgatta v. Chattar Singh*, (1877) P. R. No. 18 of 1878 (Civil); *Fatteh Singh v. Mian Singh*, (1883) P. R. No. 131 of 1883 (Civil).

² *Chimanram Motilal v. Divanchand Govindram*, (1931) 56 Bom. 180, 34 Bom. L. R. 26.

³ *Jumna Doss v. Srinath Roy*, (1886) 17 Cal. 176n, 177. See *Sungam Lal v. Mussammat Sikandar Jehan Begam*, (1889) P. R. No. 183 of 1889, F.B.

(Civil); *Ram Gopal v. Tulshi Ram*, (1928) 51 All. 79, F.B.

⁴ *Nainsukhdas Sheonarayan Shop v. Goverdhandas*, [1947] Nag. 510.

⁵ *Tyagaraja Mudaliar v. Vedathanni*, (1935) 63 I. A. 126, 38 Bom. L. R. 373, 59 Mad. 446.

⁶ *Shaiikh Muhammad Ibrahim v. Bibi Mariam*, (1928) 8 Pat. 484; *Mohammad Khan v. Sheo Bhiksh Singh*, (1929) 5 Luck. 377.

rule of English law.¹ But where a contract was signed by the defendant personally and he attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract, it was held that such evidence was not admissible for the purpose of exonerating a contracting party from liability for that would be substituting a different agreement from that evidenced by the writing.²

2. 'Any matter is required by law to be reduced to the form of a document'.—Where any matter is required by law to be reduced to the form of a document, then the document itself must be put in evidence, e.g., deeds, conveyances of land, mortgages, wills, etc. No other evidence can be substituted so long as the writing exists. But where the matter is not required by law to be reduced to the form of a document, this section does not apply, e.g., in 1866 an oral agreement with transfer of possession sufficed to create a mortgage and therefore a mortgage could be proved *aliunde* even if there was no registered document.³ No oral evidence is admissible to prove the rent payable under a lease reduced to writing.⁴ Where the document containing a transaction is inadmissible for want of registration no other evidence of its contents can be received.

There is a marked distinction between cases relating to an inchoate mortgage and those relating to an inchoate sale. In the latter, it is open to the party in possession of the land who has bought without obtaining a registered deed of conveyance to sue for specific performance of the contract to sell; but there is no right to sue for specific performance by a mortgagor who has given his land in mortgage without securing his right of redemption by a registered deed of mortgage. Where in a suit for redemption of land, the plaintiff alleged that possession was given to the defendant by way of security for a loan of Rs. 100 or upwards but no registered deed was executed to evidence the transaction, oral evidence to prove the transaction was held inadmissible.⁵

Dying declaration.—A petition of complaint and the examination of the complainant on oath under s. 200 of the Criminal Procedure Code are admissible as dying declarations under s. 32, cl. (1), and are not, as such, matters required by law to be reduced to the form of a document within the meaning of this section so as to exclude parole evidence of their terms.⁶

Exception 1.—This Exception is partly based on the maxim *omnia præsuntur rite esse acta*. "It is a general principle, that a person's acting in a public capacity is prima facie evidence of his having been duly authorised so to do; and even though the office be one the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document, or account for non-production".⁷

"This presumption of the due appointment of public officers rests on three grounds: 1st, A principle of public policy. 2nd, In some degree on the ground that, in many cases not to make it would be to resume that the party acting had been guilty of a breach of the law. 3rd, In the case of public appointments, there

¹ *Venkatasubbiah Chetty v. Govindarajulu Naidu*, (1907) 31 Mad. 45.

² *Ebrahimbhoy Pabaney Mills Co. Ltd. v. Hassan Mamooji*, (1920) 23 Bom. L. R. 767, 45 Bom. 1242.

³ *Narsi v. Parshottam*, (1928) 30 Bom. L. R. 1277, 52 Bom. 875; *Sir Sayaji Rao v. Madhavrao*, (1928) 30

Bom. L. R. 1463, 53 Bom. 12.

⁴ *Lal Rajendra Singh v. Mahant Hulasdas*, [1944] Nag. 704.

⁵ *Maung San Min v. Maung Po Hlaing*, (1925) 4 Ran. 1, F.B.

⁶ *Gouridas Namasudra v. Emperor*, (1908) 36 Cal. 659.

⁷ Best, 12th Edn., s. 356, pp.313-314.

are facilities for disproving the regularity of the appointment which do not exist in the case of the agents of private individuals".¹

Exception 2.—Probate means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator.² Probate of a will is evidence of the contents of the will against all the parties interested thereunder. Probate is secondary evidence, but it is made admissible by this section.

Explanation 1.—Illustration (a) to the section exemplifies this Explanation. When parties negotiate at a distance by letters or telegrams, the entire mass of correspondence indicates the true nature of the agreement entered into by the parties.

Explanation 2.—Illustration (c) exemplifies the meaning of this Explanation. See s. 62, Explanations 1 and 2. Bills of exchange and bills of lading have more originals than one.

Explanation 3.—Illustrations (d) and (e) exemplify this Explanation. When the contents of a document are in question, either as a fact in issue or a subalternate principal fact, the document is the proper evidence of its own contents, and all derivative proof is rejected until its absence is accounted for. But when a written instrument or document of any description is not the fact in issue, and is merely used as evidence to prove some fact, independent proof *aliunde* is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. A receipt for sums paid in part liquidation of a bond hypothecating immovable property must be registered to render it admissible as evidence. Under illustration (e) to this section such payments may nevertheless be proved by parole evidence, which is not excluded owing to the inadmissibility of the documentary evidence.³

In a suit, which was brought for the price of goods sold and delivered, the plaintiff swore to the fact of the sale and tendered in evidence a written admission of the defendant that the goods had been supplied to him. The writing was rejected, as unstamped, and the suit was dismissed. It was held that the Judge should have allowed the plaintiff an opportunity of proving by oral testimony the delivery of the goods sold, and their value.⁴ So, although where the contents of a marriage register are in issue, verbal evidence of those contents is not receivable, yet the fact of the marriage may be proved by the independent evidence of a person who was present at it.⁵

Suit on promissory note inadmissible in evidence.—The rulings of the Indian High Courts on the question where money is lent to a person who passes a promissory note, but the note is inadmissible in evidence for want of sufficient stamp or for any other reason, may be classified into two classes lucidly enunciated by Garth, C. J., in *Sheikh Akbar v. Sheikh Khan*,⁶ in which the question was whether a copy of a lost promissory note, which was itself inadmissible as being insufficiently stamped, could be received in evidence. The Court held that it could not be received in evidence. Garth, C. J., said: "When a cause of action for money is once

¹ Best, 12th Edn., s. 358, p. 315.

² The Indian Succession Act (XXXIX of 1925), s. 2(b).

³ *Dalip Singh v. Durga Prasad*, (1877) 1 All. 442; *Sukh Dial v. Mani Ram*, (1914) P. R. No. 29 of 1915 (Civil); *Sharaf Ali Khan v. Jagandhar Singh*, (1926) P. R. No. 98 of 1916

(Civil).

⁴ *Binja Ram v. Rajmohan Roy*, (1881) 8 Cal. 282.

⁵ *Balbhadar Prasad v. The Maharajah of Betia*, (1887) 9 All. 351, 356.

⁶ (1881) 7 Cal. 256, 259; *Radhakant Shaha v. Abhoychurn Mitter*, (1882) 8 Cal. 721.

complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor *on account of the debt*, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration... But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if for want of proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money". In a later case, however, the same High Court tried to explain away the above case and held in a suit brought on a *hatchitta* (promissory note) bearing an insufficient stamp and in which the defendant admitted the loan but pleaded payment, that the promissory note was not admissible in evidence but the plaintiff had a cause of action independently of it.¹ Subsequently in another case it laid down that the question, whether, when a bill or note is found to be inadmissible in evidence, the payee can sue on the original consideration, depends upon whether the cause of action with regard to the original consideration is one, which is complete in itself, and the debtor then gives a bill or note to the creditor for payment of the money at a future time. If this be so, then the plaintiff may disregard the promissory note, if he chooses, and sue upon the original debt. Where, however, the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue for the original consideration.²

The Bombay High Court approved of the principle stated in *Sheikh Akbar v. Sheikh Khan*³ in a case in which the plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for a consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. It was held that the document sued on was a promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp and that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence and the admission contained in the defendant's written statement did not amount to an admission of the claim as for

¹ *Pramatha Nath Sandal v. Dwarka Nath Dey*, (1896) 23 Cal. 851, following *Golap Chand Marwaree v. Thakurani Mohokoom Koaree*, (1878) 3 Cal. 314. It is disapproved by the Allahabad High Court in *Nazir Khan v. Ram*

Mohan, (1930) 53 All. 114, F.B.

² *Ramendramohan Tagore v. Keshabchandra Chanda*, (1934) 61 Cal. 433.

³ (1881) 7 Cal. 256.

money lent.¹ The distinction between cases in which a suit is brought solely on a promissory note or *hundi*, and cases in which there is and can be a claim to recover the original loan, has been acknowledged.² Where there is an independent admission of a loan, the holder of a *hundi*, bill or note, which is defective, and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit.³

The Madras High Court has in a full bench case held that whether a suit lies on the debt apart from the instrument depends on the circumstances under which the instrument is executed. If the promissory note embodies all the terms of the contract and the instrument is improperly stamped no suit on the debt will lie. This section and s. 35 of the Indian Stamp Act bar the way. But if it does not embody all the terms of the contract, the true nature of the transaction can be proved and, where an instrument has been given as a collateral security or by way of conditional payment, a suit on the debt will lie. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. There is no presumption that the giving of a promissory note by a debtor to his creditor operates as a conditional payment only. A lender suing on the original consideration on the ground that the instrument was given by way of conditional payment must prove facts which warrant that inference.⁴

The Allahabad High Court has in a full bench case laid down that it is not open to a party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the terms of the contract, in contravention of the provision of this section.⁵ In a recent full bench case it is laid down that the entire terms of the contract were embodied in the promissory note in the above *Nazir's* case, but where all the substantial terms of the contract have not been embodied in the promissory note and where the promissory note is inadmissible in evidence for defect of proper stamp, it is open to the plaintiff to prove the terms of the contract. It is also pointed out by some of the Judges that the distinction laid down in *Nazir's* case between cases where the money passed contemporaneously with the execution of the pro-note and where it was antecedent in time to the latter is unreal and artificial.⁶ Where a loan was already existing, and part of it had been repaid, and a promissory note was executed in favour of the creditor for the balance, it was held that the existence of the promissory note did not debar the creditor from resorting to his original consideration or exclude evidence of the oral acknowledgment of the debt.⁷

The Patna High Court has held that where the lending of money and the execution of a promissory note for repayment of it are contemporaneous, the plaintiff, in a suit for recovery of the money, is entitled to adduce evidence other than the promissory note itself, in order to prove the loan. Where, therefore, a handnote

¹ *Damodar Jagannath v. Atmaram Babaji*, (1888) 12 Bom. 443; *Jacob & Co. v. Vicumsey*, (1926) 29 Bom. L. R. 432.

² *Chentasapa v. Lakshman Ramchandra*, (1893) 18 Bom. 369.

³ *Krishnaji v. Rajmal*, (1899) 24 Bom. 360, 2 Bom. L. R. 25; *Ranchhod v. Ravjibhai*, (1925) 28 Bom. L. R. 631; *Jacob & Co. v. Vicumsey*, sup.; *Somabhai v. Kalyanbhai*, (1937) 40 Bom.

L. R. 174.

⁴ *Perumal Chettiar v. Kamakshi Ammal*, [1938] Mad. 933, F.B.

⁵ *Nazir Khan v. Ram Mohan*, (1930) 53 All. 114, F.B.; *Gopi Nath v. Srimati Chameh*, [1938] All. 741.

⁶ *Sheo Nath Prasad v. Sarju Nonia*, [1943] All. 610, 641, F.B.

⁷ *Hira Lal v. Datadin*, (1881) 4 All. 135; *Benarsi Das v. Bhikhari Das*, (1881) 3 All. 717.

bore a one-anna stamp instead of a two-annas and was therefore inadmissible in evidence, it was held that the plaintiff was entitled to prove the loan by other evidence.¹ Every loan carries with it a contract to repay and if a handnote, which forms the evidence of the transaction, cannot be accepted in evidence for some reason or other, there is nothing in law to prevent the plaintiff from giving other evidence as regards the loan and if he can satisfy the Court as regards the truth of his version, he is entitled to a decree.²

The Lahore High Court has held that where a negotiable instrument taken on account of pre-existing debt is inadmissible in evidence, the creditor may sue for the original consideration, but when the original cause of action is the instrument itself and does not exist independently of it, the plaintiff cannot sue except upon the instrument. Whether there is a cause of action independent of the instrument upon which independent evidence may be given, depends upon the question whether the plaintiff can allege any contract as the basis of his suit which is not the contract reduced to the form of a document. Where the money advanced a short time before the actual execution of a *hundi* was advanced on the security of the *hundi* and the agreement between the parties was that the loan should be made in consideration of the *hundi*, it was held that there was no cause of action independent of the *hundi*, and as the *hundi* was inadmissible in evidence on the ground that it was insufficiently stamped, and no secondary evidence could be given under this section, the plaintiff must fail.³

The Rangoon High Court has laid down several principles in a full bench case. The giving of a negotiable security by a debtor to his creditor operates, *prima facie*, as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it. Such a conditional payment is liable to be defeated on non-payment of the negotiable instrument at maturity. If the negotiable instrument is given by the borrower to the lender and the negotiable instrument is itself the consideration for the loan, or if the instrument is accepted as an accord and satisfaction of the original debt, the lender is restricted to his rights under the negotiable instrument by which he must stand or fall. If it is agreed between the parties that the instrument shall be taken merely as collateral security for the repayment of the loan, the lender is entitled to sue upon the original consideration independently of the security, and without regard to any rights that he may possess under the instrument. If all the terms of the agreement under which the loan was made have been embodied in a negotiable instrument or in any other document no evidence can be adduced in proof of the terms of the contract except the document itself, and if such document is for any reason inadmissible in evidence, the suit must fail. Normally and *prima facie* a lender is regarded as taking a negotiable instrument only as conditional payment and not in satisfaction of the loan. Where the handing over of the money and of the instrument is simultaneous it does not follow that the instrument is the sole repository of the terms of the agreement. It is not the time when, but the terms upon which, the loan was made that matters and that a question of fact to be determined according to the particular circumstances obtaining in each case.⁴

¹ *Dhaneswar Sahu v. Ramrup Gir*, (1928) 7 Pat. 845.

² *Abdul Muhammad Khan v. Mahananda Upadhyaya*, (1931) 11 Pat. 135. See *Raja Lal Bahadur Singh v. Sheikh Gulam Yasin*, (1932) 29 N. L. R. 131.

³ *Chanda Singh v. The Amritsar Banking Co.*, (1921) 2 Lah. 330.

⁴ *Maung Chit v. Roshan N. M. A. Kareem Oomer & Co.*, (1934) 12 Ran. 500, F.B. See *Maung Kyi v. Ma Ma Gale*, (1919) 10 L. B. R. 54, F.B.

In a full bench case the Chief Court of Oudh has laid down that it is open to the party who has lent money on terms recorded in a promissory note, which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the advance of the loan although oral evidence to prove the terms of the contract is inadmissible.¹ Where a promissory note is not admissible in evidence, being insufficiently stamped, the covenant for interest alleged to have been contained in the promissory note cannot be proved and the party lending the money cannot be granted interest as interest, but he is entitled to some compensation for being deprived of his money and the amount of compensation can best be calculated in the same manner as interest is calculated.²

CASES.—Confession.—A confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of this section, and no evidence can be given of the terms of such a confession except the record, if any, made under s. 364 of the Code of Criminal Procedure.³

Deposition.—The omission to read over his deposition to the witness, in accordance with Order XVIII, rule 5, of the Civil Procedure Code, renders the same inadmissible in evidence against him on his subsequent trial for forgery and oral evidence of its contents is excluded by this section.⁴

Unregistered document may be looked into for collateral purpose.—Under the proviso now added to s. 49 of the Indian Registration Act, an unregistered document affecting immovable property and required to be registered may be received as evidence of a contract in a suit for specific performance, or as evidence of part performance of a contract, or as evidence of any collateral transaction not required to be effected by a registered instrument. The proviso is declaratory of what was previously the law. An unregistered document, though inadmissible as evidence of a transaction affecting immoveable property, was admissible as evidence of collateral facts.⁵ Such document is admissible in evidence to prove the nature of the possession of the person who holds under it.⁶ In a suit to recover possession of certain property as joint undivided property the defendant relied on an earlier unregistered partition deed to show that the property in dispute was not joint but separate. It was held that the partition deed was admissible in evidence as it was not intended to prove its terms but all that the Court had been concerned with was to find out whether particular properties claimed by the plaintiff to be joint family property were at the date of the suit joint or separate.⁷

Where a document, itself legally inadmissible in evidence, was subsequently referred to and partly incorporated in a second document of similar import duly

¹ *Kunwar Bahadur v. Suraj Bakhsh*, (1932) 7 Luck. 666, F.B., approving *Nanhku Singh v. Girja Bai Singh*, (1929) 5 Luck. 225.

² *Bhrihu Datt v. Gaya Prasad*, (1933) 9 Luck. 267.

³ *Emperor v. Gulabu*, (1913) 35 All. 260.

⁴ *Emperor v. Nabab Ali Sarkar*, (1923) 51 Cal. 236; *Chenchiah v. King-Emperor*, (1919) 42 Mad. 561; *Taj Mahmud v. The Crown*, (1927) 15 Lah. 407.

⁵ *Ulfatun-nissa Elahijan Bibi v. Hosain Khan*, (1883) 9 Cal. 520, F.B.

⁶ *Haranchandra Chakrabarti v.*

Kaliprasanna Sarkar, (1931) 59 Cal. 396; *Maharani Janki Kuer v. Birji Bhikhan Ojha*, (1924) 3 Pat. 349; *Thakore Fatesingji v. Banarji A. Dalal*, (1903) 27 Bom. 515, 5 Bom. L. R. 274; *Jhampu v. Kutramani*, (1917) 39 All. 696; *Ata Muhammad v. Shankar Das*, (1925) 6 Lah. 319.

⁷ *Chhotalal v. Bai Mahakore*, (1917) 19 Bom. L. R. 322, 41 Bom. 466; *Maung Po Kin v. Maung Shwe Bya*, (1923) 1 Ran. 405; *Maung Tun Sein v. Ko Tu*, (1928) 6 Ran. 337; *Subramanian v. Lutchman*, (1922) 50 Cal. 338, 25 Bom. L. R. 582, 50 I. A. 77.

executed between the same parties and registered according to law, it was held that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered.¹

The Madras High Court has held that where the instrument of partition, being unregistered, cannot be admitted as evidence of the transaction, oral evidence to prove the terms of the agreement is barred.²

92. When the terms of any such contract, grant or other disposition of property,¹ or any matter required by law to be reduced to the form of a document,² have been proved according to the last section³, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest⁴, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Exclusion of evidence of oral agreement.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved :

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

ILLUSTRATIONS.

(a) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

¹ *Moti Chand v. Lalla Prasad*, (1917) 40 All. 256.

² *Subbu Naidu v. Varadarajulu Naidu*, [1947] Mad. 694.

(b) A agrees absolutely in writing to pay B Rs. 1,000 on the first March, 1873. The fact that, at the same time an oral agreement was made that the money should not be paid till the thirty-first March cannot be proved.

(c) An estate called "the Rampur Tea Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: "Bought of A a horse for Rs. 500". B may prove the verbal warranty.

(h) A hires lodgings of B, and gives a card on which is written—"Rooms, Rs. 200 a month". A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the term verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

(ii) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

COMMENT.—Principle.—When a transaction has been reduced into writing, either by requirement of law, or agreement of the parties, the writing becomes the exclusive memorial thereof; and no extrinsic evidence is admissible either to prove independently the transaction, or to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document may be proved either by primary or secondary evidence.

The grounds of exclusion are: (1) that to admit inferior evidence when the law requires superior would be to nullify the law; and (2) that when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.¹ All parole testimony of conversations held between parties, or declarations made by either of them, whether before, or after, or at the time of the completion of a contract, will be rejected; because such evidence would tend to substitute a new and different contract for the one really agreed upon.

Ingredients.—Scope.—This section operates only as between the parties to a deed or their representatives in interest. It has no application to strangers

¹ Phipson, 7th Edn., p. 552.

and does not therefore prevent a stranger from showing that a transaction which on the face of it purports to be one thing was in fact never intended by the parties to be that but was effected for some collateral purpose and that the real transaction between them was something different. But such a case must be pleaded and proved.¹

Under this section

(1) when the terms of (a) a contract, (b) a grant, or (c) any other disposition of property, have been reduced to the form of a document, or

(2) when any matter required by law to be reduced to the form of a document,

have been proved by the production of the document or by giving secondary evidence of its contents

no evidence of any oral agreement or statement shall be admitted as between the parties to any such document or their representatives in interest, for the purpose of (i) contradicting, (ii) varying, (iii) adding to, or (iv) subtracting from its terms. There are six exceptions to this—

(1) Any fact which would (i) invalidate any document, or (ii) entitle any person to any decree or order relating thereto may be proved, such as fraud, intimidation, illegality, failure of consideration, mistake in fact or law.

(2) Any separate oral agreement (i) as to any matter on which the document is silent, and (ii) which is not inconsistent with its terms, may be proved.

(3) Any separate oral agreement, constituting a condition precedent to the attaching of any obligation under the document, may be proved.

(4) Any subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved, except when such contract or grant (i) is required to be in writing, or (ii) has been registered.

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are not repugnant to, or inconsistent with, its express terms.

(6) Any fact which shows in what manner the language of the document is related to existing facts, may be proved.

This section is supplementary to s. 91 and is, to some extent, implied in it. If the contract, grant or disposition has been reduced into writing, s. 91 says no evidence shall be given of it, except the document itself, and this rule would be in vain, unless, as is said in this section, it was also forbidden to contradict, vary, add to, or subtract from, its terms.²

Scope.—The section applies only where, upon the face of it, the written instrument appears to contain the whole contract.³ If the parties have intended to reduce all the terms of the contract into writing, then no parole evidence is admissible; but if they intended only to reduce into writing a portion of the terms of the contract, then they are entitled to give parole evidence of the terms which they did not intend to reduce into writing.⁴

Benami transaction.—This section applies only to the terms of a transfer and does not preclude the admission of any evidence to show the benami character of the transaction.⁵

¹ *Rangubai v. Govind*, [1949] Nag. (1886) 17 Cal. 176n, 177.

² Markby, 73.

³ *Cutts v. Brown*, (1880) 6 Cal. 328, 337.

⁴ *Jumna Dass v. Srinath Roy*,

⁵ *Richard Taylor v. Rajah of Palakimedi*, (1909) 32 Mad. 443, 454; *Pathammal v. Syed Kalai Ravuthar*, (1903) 27 Mad. 329.

1. 'When the terms of any such contract, grant or other disposition of property'.—These words, when read with the words "as between the parties to any such instrument" which follow them, refer to bilateral instruments only and not to unilateral instruments, such as wills and powers-of-attorney. Oral evidence as to the 'terms' of a written contract is excluded. There is nothing to exclude oral evidence that there was no agreement between the parties and therefore no contract.¹

2. 'Or any matter required by law to be reduced to the form of a document'.—These words, when read with the words "as between the parties" and "any oral agreement and statement", refer to bilateral contracts, grants or other dispositions of property, which the law requires to be reduced to writing and not to every matter which the law requires to be reduced to writing.

3. 'Have been proved according to the last section'.—The provisions of the section come into force when the written instruments referred to in the section have been proved in accordance with the provisions of s. 91, that is, either by the production of the document itself, or by the production of the secondary evidence of it.

4. 'No evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest'.—The section forbids the admission of evidence of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written document as between the *parties* to such document or their representatives in interest. The rule of exclusion laid down in the section does not apply to the case of a *third* party who is not a party to the document. On the contrary, s. 99 distinctly provides that persons who are not parties to a document may give evidence tending to show a contemporaneous agreement varying the terms of the document.² Extraneous evidence to show that the parties to a sale-deed had no intention of conveying a particular item of property included in the deed is admissible where the person challenging the transfer is not a party to the deed.³

The words 'between the parties to any such instrument' refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to a purchase, and that the plaintiff was solely entitled to the property to which it related. M conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. It was held that this section did not preclude the plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers.⁴ The plaintiff sued to recover money which he had been compelled to pay in virtue

¹ *Tyagaraja Mudaliyar v. Veda-*
thanni, (1935) 38 Bom. L. R. 373, 63
I. A. 126, 59 Mad. 446.

² *Bageshri Dayal v. Pancho*, (1906)
28 All. 473.

³ *Ram Sundar Mal v. Collector of*

Gorakhpur, (1930) 52 All. 793.

⁴ *Mulchand v. Madho Ram*, (1888)
10 All. 421. See *Pokal Gungayah v.*
Ismail Mahomed Madaree, (1895) 2
U. B. R. (1892-96) 354.

of a mortgage executed by his two half-sisters and himself. His claim was based on the plea that, though appearing in the bond as a co-obligor, he was in reality merely a surety. It was held that evidence was admissible to show that the plaintiff executed the mortgage bond as a surety only.¹ The Rangoon High Court has dissented from this view and held that oral evidence to show that one of the executants of a monetary bond to the knowledge of the money-lender signed it only as a surety is not admissible.² The Privy Council has held that oral evidence is inadmissible to show that the person who has signed a promissory note is not liable but some one else is.³

The section does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance.⁴ As between the parties to an absolute conveyance this section precluded the giving of oral evidence to prove that the transaction was intended to be a mortgage. But where the grantee took knowing that a third person was the owner of the property and the grantor was only a mortgagee, and that the intention of all parties was merely to transfer the mortgage, oral evidence of the third party's rights was admissible to prove the real nature of the transaction.⁵

5. 'For the purpose of contradicting, varying, adding to, or subtracting from, its terms'.—This is what the section forbids. But it does not prevent a party to a contract from showing by oral evidence that the consideration is different from that described in the contract. It is therefore open to a party to show that that part of the consideration as to rent payable in terms of a lease represented a past debt for rent and not a future liability arising under the contract.⁶

Evidence of intention, acts and conduct.—The Privy Council laid down in *Balkishen v. Legge* that oral evidence of intention is not admissible for the purpose of construing a deed or ascertaining the intention of the parties to the deed. A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits. The vendor did not exercise his right of re-purchase; but, after many years, gave notice of his intention to redeem, and sued to enforce his right of redemption as upon a mortgage by conditional sale. The Privy Council held that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible and that the case must be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document was related to existing facts.⁷ Even

¹ *Shamsh-ul-Jahan Begam v. Ahmad Wali Khan*, (1903) 25 All. 337; *Khuda-wand Karim v. Narendra Nath*, (1935) 58 All. 548; *Mohammad Husain v. Lala Hanoman Prasad*, (1942) 18 Luck. 81.

² *Maung Ko Gyi v. U Kyaw*, (1927) 5 Ran. 168.

³ *National Bank of Upper India, Limited v. Bansidhar*, (1929) 5 Luck. 1, 32 Bom. L. R. 136, 57 I. A. 1; *Khumaji Gajaji & Co v. Damaji*, (1933) 35 Bom. L. R. 1197.

⁴ *Maung Kyin v. Ma Shwe La*,

(1911) 13 Bom. L. R. 797, 38 Cal. 892, 38 I. A. 146.

⁵ *Maung Kyin v. Ma Shwe La*, (1917) 44 I. A. 236, 20 Bom. L.R. 278, 45 Cal. 320.

⁶ *Abdullakin v. Maung Ne Dun*, (1929) 7 Ran. 292.

⁷ *Balkishen v. Legge*, (1899) 2 Bom. L. R. 523, 27 I. A. 58, 22 All. 149; *Maharu v. Khandu*, (1924) 26 Bom. L. R. 742, P.C.; *Vihoba v. Narayan*, [1942] Nag. 592; *Kesarbai v. Rajabhai*, [1944] Nag. 141.

after this pronouncement of the Judicial Committee there was a conflict of view between the Bombay and the Madras High Courts on the one hand and the Calcutta High Court on the other on the question whether oral evidence as to acts and conduct of parties subsequent to a deed was admissible to show that what on the face of it was a conveyance of sale was in reality a mortgage. The High Courts of Bombay¹ and Madras² were of opinion that such evidence was not admissible. The former Chief Court of Lower Burma³ and the former Judicial Commissioner's Court of Upper Burma⁴ followed this view. On the other hand the Calcutta High Court⁵ was of opinion that such evidence was admissible. The former Chief Court of the Punjab⁶ had adopted the view of the Calcutta High Court. This conflict has been set at rest by the Privy Council in *Maung Kyin's* case, above referred to, in which it has expressly overruled the decisions of the Calcutta High Court and approved those of the Bombay and the Madras High Courts. It has held that as between the parties to an absolute conveyance this section precludes the giving of oral evidence to prove that the transaction was intended to be a mortgage.⁷

Though this section precludes oral evidence of intention for the purpose of construing deeds or proving the intention of the parties, it merely prescribes a rule of evidence, and does not fetter the Court's power to arrive at the true meaning and effect of a document in the light of all the circumstances surrounding the transaction.⁸

It is always permissible to look to the surrounding circumstances to see in what manner the language of a document was related to existing facts. A party is not precluded from showing that the writing was not the contract between the parties but was only a fictitious or colourable device which cloaked something else.⁹

Evidence of subsequent conduct is not admissible for construing a document when the words used are plain.¹⁰

CASES.—Intention, conduct, etc.—The plaintiff sued to recover possession of land contending that the document under which the defendants held the land, though in form an absolute conveyance, was intended to operate merely as a mortgage. The plaintiff's contention was based on the ground that the consideration was a previously existing debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death and that after his death his widow remained in possession for three years; that there was no transfer of the land into the *khata* of the transferee, and that the consideration was grossly inadequate. It was held that the transaction was

¹ *Dattoo v. Ramchandra*, (1905) 30 Bom. 119, 7 Bom. L. R. 669; *Abaji v. Laxman*, (1906) 30 Bom. 426, 8 Bom. L. R. 553.

² *Achutaramaraju v. Subbaraju*, (1901) 25 Mad. 7.

³ *Maung Bin v. Ma Hlaing*, (1906) 3 L. B. R. 100, F.B.

⁴ *Mi Gywe v. Keshan Ram*, (1908) 2 U. B. R. (1907-1909) (Ev.) 15.

⁵ *Pronath Shaha v. Madhu Sudan Bhuiya*, (1898) 25 Cal. 603, F.B.; *Khan- kar Abdur Rahman v. Ali Hafez*, (1900) 28 Cal. 256; *Mahomed Ali Hossein v. Nazir Ali*, (1901) 28 Cal. 289.

⁶ *Abdul Ghafur Khan v. Abdul*

Kadir, (1901) P. R. No. 72 of 1901 (Civil); *Bulaki Mal v. C. J. Floyd*, (1911) P. R. No. 27 of 1911 (Civil).

⁷ *Maung Kyin v. Ma Shwe La*, (1917) 44 I. A. 236, 20 Bom. L. R. 273, 45 Cal. 320, 9 L. B. R. 114; *Maung Shwe Phoo v. Maung Tun Shin*, (1927) 5 Ran. 644.

⁸ *Bairnath Singh v. Hajee Vally Mahomed*, (1924) 27 Bom. L. R. 787, 3 Ran. 106, P.C.

⁹ *Asaram v. Lubdeshwar*, [1939] Nag. 1.

¹⁰ *Markandelal v. Sitambharnath*, [1943] Nag. 10.

an out-and-out sale and no evidence of the several circumstances relied on could be admitted to show that it was a mortgage.¹ The plaintiffs, who were agriculturists, brought a suit to redeem and the defendant contended that the transaction in suit was a sale out-and-out and not a mortgage. The lower Court held that the transaction was a mortgage and allowed redemption. It was held that evidence of intention could not be given for the purpose merely of construing a document which purported to be a sale out-and-out and not a mortgage.²

A deed of sale of immoveable property and an agreement for re-sale to the vendor do not together constitute a mortgage unless it appears from the documents, in the light of surrounding circumstances, that the parties so intended. The intention of the parties, which is the test in such a case, must be gathered from the language of the documents themselves.³

Oral evidence inadmissible to vary terms.—The executant of a promissory note cannot be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but only after the adjustment of some accounts between the parties.⁴ No oral evidence is admissible to vary the amount of price fixed in a registered sale-deed⁵ or the terms of a cheque which is a negotiable instrument⁶ or the rate of interest different⁷ from that in the written contract. A mortgage with possession was executed in plaintiff's favour for a term of ten years. Possession was not, in fact, taken by the plaintiff, but by a second document of even date, the mortgaged land was leased to the mortgagor for the same term at an annual rent. The Court of the Judicial Commissioner held that reading the mortgage with the lease of even date, and taking into account the fact that possession had remained all along with the mortgagor and that there had been other similar transactions between the parties, the mortgage should be construed only as a simple mortgage. The Privy Council held that this section forbade the admission or consideration of evidence as to the intention of the parties or to contradict the express terms of the document, and that the mortgage in question was, as it purported on the face of it to be, a possessory mortgage.⁸

An oral agreement not to execute a decree, entered into between the parties after the filing of the suit and before the passing of the decree, provided the defendant

¹ *Dattoo v. Ramchandra*, (1905) 7 Bom. L. R. 669, 30 Bom. 119; *Keshavrao v. Raya*, (1906) 8 Bom. L. R. 287; *Bai Adhar v. Lalbhai*, (1921) 24 Bom. L. R. 239; *Talakchand v. Atmaram*, (1923) 25 Bom. L. R. 818.

² *Abaji v. Laxman*, (1906) 30 Bom. 426, 8 Bom. L. R. 553; *Achutaramaraju v. Subbaraju*, (1901) 25 Mad. 7.

³ *Jhanda Singh v. Sheikh Wahid-ud-din*, (1916) 19 Bom. L. R. 1, 43 I. A. 284, 38 All. 570.

⁴ *Sri Ram v. Sabha Ram, Gopal Rai*, (1922) 44 All. 521. This case has been dissented from in a subsequent case in which the same High Court held that evidence to show that an instrument like a promissory note, the title to which generally passes by delivery, was delivered conditionally

or for a special purpose only, and not for the purpose of transferring absolutely the property therein, is not only admissible but is precisely the class of evidence contemplated by s. 46 of the Negotiable Instruments Act and this section: *Sheo Prasad v. Gobind Prasad*, (1927) 49 All. 464; *Bhogi Ram v. Kishori Lal*, (1928) 50 All. 754.

⁵ *Adityam Iyer v. Rama Krishna Iyer*, (1913) 38 Mad. 514.

⁶ *Walter Mitchell v. A. K. Tennent*, (1925) 52 Cal. 677.

⁷ *Fitz-Holmes v. Bank of Upper India, Ltd.*, (1923) 4 Lah. 258; *Gopal v. Achut*, [1942] Nag. 498.

⁸ *Feroz Shah v. Sobhat Khan*, (1933) 35 Bom. L. R. 877, 14 Lah. 466, 60 I. A. 273.

did not contest the suit, is admissible in evidence as it does not vary the terms of the decree, and can be pleaded in bar of execution.¹

Oral evidence inadmissible to contradict written terms.—In a suit for a declaration that an apparent sale-deed executed by the plaintiff was a mortgage and for redemption, the lower Courts allowed the plaintiff to adduce evidence to prove that the defendant at the time of the execution of the sale-deed represented to the plaintiff that the sale-deed would not be enforced as such. It was held that no evidence of a contemporaneous agreement, or promise, or representation inconsistent with the written document could be admitted.² Where, on the language of a sale deed, the intention of the parties was clear and the receipt of the consideration was acknowledged therein and evidence was adduced to prove the intention and to contradict the recital regarding payment of consideration, it was held (i) that no evidence other than the deed itself was admissible for the purpose of ascertaining the intention of the parties; that there was nothing in this section to prevent a person from adducing evidence for the purpose of shewing that a recital in a deed was untrue and, therefore, that evidence to contradict the recital and to prove that the consideration was not paid was admissible under the section.³

Oral evidence admitted where third party is concerned.—Plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. It was held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what as purported to be a usufructuary mortgage was not in reality such, but was in fact a sale.⁴

Proviso 1.—This proviso applies to cases where evidence is admitted to show that a contract is void, or voidable, or subject to re-formation, upon the ground of fraud, duress, illegality, etc., in its inception.⁵ See illustration (d) and (e). The instances given in the proviso are not exhaustive. They are set out by way of illustration only. If the validity of a written agreement is impeached, it is no defence to point to the apparent rectitude of the document and to claim protection from inquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases, the Court is not bound by what has been described as the mere paper expressions of the parties, and is not precluded from inquiring into the real nature of the transaction between them. The proviso declares that any fact may be proved which would invalidate any document.⁶ A party to an instrument may prove

¹ *Papamma v. Venkayya*, (1935) 58 Mad. 994, F.B., disapproving *Rajah of Kalahasti v. Venkatadri Rao*, (1927) 50 Mad. 897; *Goseti Subba Row v. Varigonda Narasimham*, (1903) 27 Mad 368; *Chidambaram Chettiar v. Krishna Vathiyar*, (1916) 40 Mad. 233, F.B.; *Laldas v. Kishordas*, (1896) 22 Bom. 463, F.B. Contra, *Benode Lal Pakrash v. Bajendra Kumar Saha*, (1902) 29 Cal. 810; *Hassan Ali v. Gauzi Ali Mir*, (1903) 31 Cal. 179.

² *Dagdu v. Nama*, (1910) 12 Bom. L. R. 972; *Namdeo v. Dhondur*, (1920) 22 Bom. L. R. 979, 44 Bom. 961.

³ *Md. Murtaza v. Abdul Rahman*, (1948) 27 Pat. 122.

⁴ *Bageshri Dayal v. Pancho*, (1906) 28 All. 473, *Rahiman v. Elahi Baksh*, (1900) 28 Cal. 70, dissented from; *Ganu v. Bhau*, (1918) 20 Bom. L. R. 684, 42 Bom. 512; *Kumara v. Srinivasa*, (1887) 11 Mad. 213, 215.

⁵ Per Garth, C.J., in *Cutts v. Brown*, (1880) 6 Cal. 328, 338.

⁶ *Beni Madhab Dass v. Sadasook Kotary*, (1905) 32 Cal. 437, F.B.; *Ma Thin Myaing v. Maung Gyi*, (1923) 1 Ran. 351.

that it was a mere paper transaction, never intended to be given effect to or acted upon.¹

The combined effect of this proviso and s. 31 of the Specific Relief Act is to entitle either party to a contract, whether plaintiff or defendant, to protect his right by proving a mistake in a written contract, e.g., a mistake in the description of the property sold by giving a wrong survey number to the same. Mistake in the belief of a party to a document may be pointed out under this proviso.² It is immaterial if the mistake is caused by innocent misrepresentation.³ Evidence of mutual mistake is admissible under this proviso.⁴

The Privy Council has held that this section only excludes oral evidence to vary the terms of a written contract, and has no reference to the question whether the parties had agreed to contract upon the terms set forth in a particular document. Even if there were no provisos to ss. 91 and 92 there is nothing in either section to exclude oral evidence that a document purporting to embody the terms of a contract was never intended to operate as an agreement but was brought into existence solely for the purpose of creating evidence on some other matter. Such oral evidence stands on the same footing as would evidence that the alleged signature of one of the parties was a forgery.⁵ The English Court of Equity permits evidence to be given to show that a document was intended to operate in a manner different from the plain and apparent meaning of its language.

Where parties enter into a sale-deed, it is not competent to them to prove a contemporaneous oral agreement to reconvey the property sold on payment of the sum advanced, in the absence of fraud, misrepresentation, or failure of consideration, etc., rendering the sale invalid.⁶

Fraud.—Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of equity considered as having been obtained fraudulently.⁷

A mortgagor of immoveable property is not estopped from pleading, or taking advantage of, the invalidity of his mortgage deed on the ground that, by the inclusion of a fictitious property in the document and getting it registered in an office where otherwise it could not have been registered, a fraud on the registration law was committed in which he participated.⁸

Misrepresentation.—Where one party to a contract does not agree to any of its stipulations and the other party induces him, not indeed to agree to it, but to agree to its formal insertion in the written contract, by representing that the stipulation in question would be in reality treated by him as a dead letter, it cannot be enforced because the party induced had never assented to it and its inclusion in the written contract was the result of misrepresentation.⁹ Where, at the time of executing a document, a representation is made that the document though in form a sale-deed will not be enforced as against the executant as a sale-deed, and

¹ *Ram Sundar Mal v. Collector of Gorakhpur*, (1930) 52 All. 793.

² *Tani Mahesha v. The Secretary of State for India in Council*, (1894) P. R. No. 67 of 1894 (Civil).

³ *Chimanram Motilal v. Divanchand Govindram*, (1931) 56 Bom. 180, 34 Bom. L. R. 26.

⁴ *Janardan v. Venkatesh*, (1938) 41 Bom. L. R. 191, [1939] Bom. 149

⁵ *Tyagaraja Mudaliyar v. Veda-*

thanni, (1935) 63 I. A. 126, 137, 38 Bom. L. R. 373, 59 Mad. 446.

⁶ *Sangira v. Ramappa*, (1909) 11 Bom. L. R. 1130, 34 Bom. 59.

⁷ *Abaji v. Laxman*, (1906) 30 Bom. 426, 8 Bom. L. R. 553.

⁸ *Ramnandan Prasad Narayan Singh v. Chandradip Narain Singh*, (1940) 19 Pat. 573.

⁹ *Sangira v. Ramappa*, sup.

where on the faith of that representation the executant executes the document, the sale-deed cannot be upheld as a sale-deed as against him.¹

Illegality.—Oral evidence is admissible to prove that the real object or consideration of an agreement in writing is unlawful and that therefore the agreement is void.² See s. 23 of the Indian Contract Act.

Want of due execution.—The term 'execution' means the last act or series of acts which completes a document. It is a formal completion of a document. Thus, execution of deeds is the signing, sealing and delivery of them in the presence of witnesses. Execution of a will includes attestation.³ Writing, stamp, registration, attestation are all formalities necessitated by statutes.

Want of consideration.—Want of consideration, or failure of consideration, or difference in the kind of consideration may be proved. But parole evidence to vary the consideration is not admissible. The want or failure of consideration contemplated by the proviso is a complete want of failure of consideration.⁴ Notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has actually been paid,⁵ but was agreed to be paid in a different manner.⁶ If this was not so, facilities would be afforded for the grossest frauds. It is no infringement of this section for a Court to accept proof that by a collateral arrangement between the vendor and purchaser the consideration money remained with the purchaser and under the conditions agreed upon between them.⁷ The section does not say that no statement of fact in a written instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied.⁸ Where a part of the sale consideration is on the face of the document still outstanding and to be paid by the vendee, it is not open to him to produce evidence to show that there was a separate contemporaneous oral agreement that this sum would not be payable and was merely fictitious.⁹ The amount of sale consideration is a term of a deed of sale and no evidence of any oral agreement can be given for the purpose of varying the amount. An agreement made without consideration is void except in the three cases specified in s. 25 of the Indian Contract Act. When it is brought to the notice of a Court that the consideration for a contract which it is asked to enforce is, in whole or in part, an unlawful consideration, such Court is bound to give effect to the fact thus brought to its notice, notwithstanding that the contract may appear upon the face of it to be a perfectly legal contract, and that the unlawfulness of the consideration was never pleaded by the defendant.¹⁰

CASES.—Where a deed of sale described the consideration to be Rs. 100 in ready cash received, but the evidence showed that the consideration was an old bond for Rs. 63-12 and Rs. 36-4 in cash, it was held that there was no real variance

¹ *Navalbai v. Sivubai*, (1906) 8 Bom. L. R. 761.

² *Kashi Nath Chukerbati v. Brindabun Chukerbati*, (1884) 10 Cal. 649; *Anupchand Hemchand v. Champsi Ugerchand*, (1888) 12 Bom. 585.

³ *Bhavarajji Harbhun v. Devji Purja*, (1894) 19 Bom. 635, 638.

⁴ *Keshavrao v. Raya*, (1906) 3 Bom. L. R. 287.

⁵ *Radhamohan Thakur v. Bipin Behari Mitra*, (1938) 17 Pat. 318.

⁶ *Indarjit v. Lal Chand*, (1895) 18 All. 168.

⁷ *Irjanali Laskar v. Jogendrachandra Das Patni*, (1932) 59 Cal. 1111.

⁸ *Sah Lal v. Indrajit*, (1900) 2 Bom. L. R. 553, 27 I. A. 93, 22 All. 370; *Lala Dholan Das v. Ralya Shah*, (1899) P. R. No. 85 of 1898 (Civil); *Mussammatt Zohra Jan v. Mussammatt Rajan Bibi*, (1915) P. R. No. 48 of 1915 (Civil).

⁹ *Muhammad Taqi Khan v. Jang Singh*, (1935) 58 All. 1, F.B.

¹⁰ *Alice Mary Hill v. William Clarke*, (1904) 27 All. 266.

between the statement in the deed and the evidence as to consideration, having regard to the fact that it is customary in India, when a bond is given wholly or partially in consideration of an existing debt, to describe the consideration as being "ready money received".¹ Plaintiffs sued for specific performance of an agreement in writing, which set forth, *inter alia*, that defendants had agreed to sell, etc., under "certain conditions as agreed upon". The defendants alleged that the written agreement did not contain the whole of the agreement between the parties, and offered parole evidence in support of their contention. It was held that the parole evidence was admissible to show what was meant by the clause "certain conditions as agreed upon".²

Defendant, who had been gambling with plaintiffs and had lost, gave the plaintiffs two promissory notes, partly for his gambling losses and partly on other accounts, but it could not be ascertained what proportion of the total sum secured was represented by the gambling debts. In a suit to recover on these notes, it was held that it was open to the defendants to prove that the consideration was in part at least money lost in gambling, and that as the part of the consideration represented by gambling debts could not be separated from the rest, the suit would fail.³

A Hindu widow, who signed a document evidencing the undivided status of her husband and his brother and making certain provision for her maintenance, alleged that she was induced to sign the document on the verbal assurance by the brother that the document was only intended to create evidence of the undivided status of the family and the provision for her maintenance was not final but was to be settled in future. In a suit for arrears of maintenance, it was held that oral evidence was admissible to establish that the provision for maintenance in the document was not to be acted upon and therefore there was no contract as to maintenance.⁴

Mistake of fact.—Evidence may be admitted to prove that there was mutual mistake in the working of an agreement and to prove what the real intention of the parties was, and such evidence as to the alleged mistake may be given not only in a suit for the rectification of the mistake brought under s. 31 of the Specific Relief Act, but also in a suit based upon the agreement itself.⁵ It is open to the Court to allow oral evidence of mutual mistake of fact to vary the terms of a deed. Oral evidence will be admissible even if the mistake is due to innocent misrepresentation.⁶ Where a promissory note stated that the interest was payable at the rate of rupees two per mensem and in a suit on the promissory note the plaintiff contended that the interest agreed upon was two per cent. per mensem and that the words "per cent." had been omitted by mistake, it was held that oral evidence was admissible to prove that the rate of interest agreed upon was two per cent. per month.⁷

¹ *Hukumchand v. Hiralal*, (1876) 3 Bom. 159; *Sheikh Muhammad Bakhs v. Ramdat*, (1896) P. R. No. 5 of 1896 (Civil); *Le Hu v. Elahi Buz*, (1900) 2 U. B. R. (1897-1901) 400.

² *Cutts v. Brown*, (1880) 6 Cal. 328.

³ *Balgobind v. Bhaggu Mal*, (1913) 35 All. 558.

⁴ *Tyagaraja Mudaliyar v. Veda-*

thanni, (1935) 63 I. A. 126, 38 Bom. L. R. 373, 59 Mad. 446.

⁵ *S. Narayanaswamy v. James D. Rodriguez*, (1906) 3 L. B. R. 227; *Janardan v. Venkatesh*, (1938) S. A. No. 208 of 1938, per Beaumont, C.J.

⁶ *Chimanram v. Divachand*, (1981) 34 Bom. L. R. 26, 56 Bom. 180.

⁷ *Kamla Prasad Pandey v. Hasan Ali Khan*, [1939] All. 329.

Mistake of law.—Under the Indian Contract Act an agreement is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to law not in force in British India has the same effect as a mistake of fact (s. 21). But Courts do relieve against mistakes in law as well as mistakes in fact, in cases where there is some circumstance which makes it inequitable that the party who has received the money of other party should retain it.

Proviso 2.—Under this proviso evidence of any collateral parole agreement which does not interfere with the terms of the contract may be given. See *ills. (f), (g) and (h)*. Parties can prove that, either contemporaneously or as a preliminary measure, they entered into a distinct oral agreement on some collateral matter. The only case in which oral evidence will be admitted under the proviso is where the instrument is silent on the matter sought to be proved and the agreement to be proved is consistent with the terms of the document. It is allowable to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, but such oral agreement must be clearly proved and the onus lies on him who sets it up.¹ Where the document does not record all terms of the contract between the parties, oral evidence is admissible to explain the real nature of the transaction.²

If there is a rule of law which requires the transaction to be in writing, any separate agreement must also be in writing.

The amount of the price agreed to be paid is an essential term of a contract of sale; and consequently no evidence of an oral agreement at variance with the provisions of a registered sale-deed as to the amount of the price fixed for the sale is admissible.³ Evidence that a sale-deed was not intended by the parties thereto to be operative for the purpose of passing title is inadmissible.⁴

In considering whether or not this proviso applies, the Court shall have regard to the formality of the document. The principal rule applies only to formally complete contracts; for in such, it is reasonable to suppose that the parties have set down all they intended, and omitted nothing. This presumption becomes weaker and weaker, as the document is found to be less and less formal. And in the case of memoranda of agreements, etc., as we are not bound to presume that everything has been reduced to writing, parole testimony to prove additional terms, etc., is reasonably enough admissible. The rule being confined to formal and complete documents, a mere receipt in general may be invalidated by parole evidence of fraud or mistake. So, of a loose memorandum which does not profess to embody the whole of the parties' intentions. On this ground the section directs the Court, in considering whether parole testimony is to be admitted or not, to have regard to the formality of the documents: see illustrations (g) and (h).⁵

The last words of the proviso show that the Court has some discretion in the application of the rule. If a document is very formal in its terms and carefully drawn up, it would be reasonable to presume that the whole intention of the parties was expressed, and that anything omitted was deliberately intended to be excluded in which case no oral admission would be permitted.⁶

¹ *Motabhoj Mulla Essabhoj v. Mulji Haridas*, (1915) 42 I. A. 103, 17 Bom. L. R. 460, 39 Bom. 399; *Badal Ram v. Jhulai*, (1921) 44 All. 53.
² *Sir Mohammad Akbar Khan v. Attar Singh*, (1936) 38 Bom. L. R. 739, 17 Lah. 557, 63 I. A. 279.

³ *Adityam Iyer v. Rama Krishna Iyer*, (1913) 38 Mad. 514.
⁴ *Lachman Das v. Ram Prasad*, (1927) 49 All. 680.

⁵ Norton.

⁶ Markby, 73.

Contemporaneous oral agreement to pay interest on hundi.—Such an agreement is not admissible in evidence when there is no stipulation regarding interest in the *hundi* (promissory note). In such cases the payee of the *hundi* is entitled only to interest at the rate of six per cent. per annum as provided by s. 80 of the Negotiable Instruments Act.¹ If there is a collateral written agreement fixing the rate of interest, in accordance with the custom prevailing in the district, the interest is recoverable at the rate agreed upon between the parties.²

Proviso 3.—This proviso presupposes that the contract, grant or disposition of property itself remains intact, but the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder.³ Under this proviso a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect, and that it was to impose no obligation at all until the happening of a certain event, may be proved. See *ills. (i) and (j)*.

The true meaning of the words “any obligation” is any obligation whatever under the contract, and not some particular obligation which the contract may contain.⁴ Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parole evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the written agreement has not become binding. This rule will not apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.⁵ The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible. There is no rule of law to estop parties from showing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid or something else was done.⁶

Evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for re-sale is executed is admissible.⁷ An oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit until the happening of a particular event, i.e., that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within this proviso.⁸ A collateral oral agreement which is the condition of the execution of

¹ *Banwari Lal v. Jagarnath Prasad*, (1916) 1 P. L. J. 71; *Faluma Bivi v. Hanumantha Row*, (1907) 17 M. L. J. 296; *Kishor Chand v. Guran Ditta Mal*, (1911) P. R. No. 52 of 1911 (Civil). See, however, *In re Sowdamonee Debya v. A. Spalding*, (1882) 12 C. L. R. 163.

² *Goswami Sri Ghanshiam Lalji v. Ram Narain*, (1906) 34 I. A. 6, 9 Bom. L. R. 1, 29 All. 33.

³ *Chhaganlal Kalyandas v. Jagji-wandas Gulabdas*, (1939) 41 Bom. L. R. 1263.

⁴ *Jugtanund Misser v. Nerghan Singh*, (1880) 6 Cal. 433; *Radhakissen Chamarla v. Durga Prasad Chamarla*, (1931) 59 Cal. 106.

⁵ *Jugtanund Misser v. Nerghan Singh*, *ibid.*; *Walter Mitchell v. A. K. Tennent*, (1925) 52 Cal. 677; *C. W. Kinlock v. Asa Ram*, (1877) P. R. No. 51 of 1877 (Civil); *Khuda Baksh v. Budhar Mal*, (1882) P. R. No. 186 of 1882 (Civil).

⁶ *Pym v. Campbell*, (1856) 6 El. & Bl. 370, 371.

⁷ *Dada Honaji v. Babaji Jagushet*, (1865) 2 B. H. C. (A. C. J.) 86; *Ady v. Administrator-General, Burma*, (1938) 40 Bom. L. R. 1057, [1938] Ran. 417, P.C.

⁸ *Ramjibun Serowgy v. Oghore Nath Chatterjee*, (1897) 25 Cal. 401; *Vishnu v. Ganesh*, (1921) 23 Bom. L. R. 488, 45 Bom. 1155; *Hira Lal v. Benarsi Das*, (1925) 6 Lah. 411.

a promissory note would fall within this proviso, and evidence of it would therefore be admissible to prove it. A collateral agreement which alters the legal effect of a promissory note must be distinguished from an agreement that the instrument should not be an effective instrument until some condition is fulfilled or to put it in another form, an agreement in defeasance of the contract must be distinguished from an agreement suspending the coming into force of the contract contained in the promissory note. An agreement coming under the latter description is within this proviso. Where a promissory note is by its express terms payable on demand, the obligation under the note attaches immediately. But an oral agreement not to make a demand until some specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation which is the contract contained in the promissory note. The oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of this proviso. Where the collateral agreement which was the condition of the execution of a promissory note was a written agreement it was held that it was outside this section.¹

An oral agreement that the execution of a deed of reconveyance should be a condition precedent to the execution of the sale-deed in pursuance of the written contract to sell immovable property can be proved under this proviso.²

There is no difference in substance, but only in illustration and application, between the provision in s. 46 of the Negotiable Instruments Act and this proviso.³

CASES.—Where the contract was to sell property for Rs. 30,000 which sum was erroneously stated to have been paid, it was competent for the vendor, without infringing any provision of the Act, to prove a collateral agreement that the purchase-money should remain in the vendee's hands for the purposes and subject to the conditions alleged by the vendor.⁴ Because the section does not say that no statement of fact in a written instrument may be contradicted by oral evidence but that the terms of the contract may not be varied, etc. Where a person admitted the execution of a deed of surrender but assailed the transaction, evidenced thereby, as fraudulent on the ground that a separate oral agreement constituting a condition precedent to the surrender taking effect had not been acted upon by the person in whose favour it had been made, it was held that evidence of the oral agreement for the purpose of proving the fraudulent character of the transaction between the parties was admissible.⁵

Proviso 4.—This proviso is based on the principle—"Nothing is so agreeable to natural equity as that a thing be unbound in the manner in which it was bound." Under this proviso a prior written contract may be varied by a subsequent verbal one, in cases in which the law does not require the contract to be in writing. Where the original contract is of such a nature as that the law requires it to be in writing or where its execution has been followed by the formality of registration, the only way of proving the rescission or modification of the original contract must be by proof of an agreement of the like formality and not by an oral agreement.

Only those agreements come within the proviso which affect the terms of the previous transaction directly by virtue of the consensus of those who alone are

¹ *Ady v. Administrator-General, Burma*, (1938) 40 Bom. L. R. 1075, [1938] Ran. 417, P.C.; *Bhogi Ram v. Kishori Lal*, (1928) 50 All. 754; *Ali Jawad v. Kulanjan Singh*, (1922) 44 All. 421; *Dowlatram v. Vasdeo*, [1942] Kar. 516.

² *Sahdeo v. Namdeo*, [1948] Nag. 900.

³ *Sheo Prasad v. Gobind Prasad*, (1927) 49 All. 464.

⁴ *Sah Lal v. Indrajit*, (1900) 2 Bom. L. R. 558, 27 I. A. 93, 22 All. 370.

⁵ *Ulasmoni v. Sukhomani*, (1945) 24 Pat. 230.

competent to rescind or modify the original contract, viz., all the parties concerned or all their representatives.¹ The words of the proviso apply to any agreement whether executory or executed.²

The word 'oral' is used in the sense of being not committed to writing, and the words 'oral agreement' include all unwritten agreements, whether arrived at by word of mouth or otherwise, that is, by acts or conduct of parties.³

In a suit for redemption, the mortgagees pleaded that the mortgaged property was subsequently sold to them verbally for the mortgage debt and a further loan. It was held that the mortgage being by a registered deed, evidence of a subsequent oral agreement of sale was inadmissible under this proviso.⁴

The Calcutta and the Madras High Courts have held that oral evidence is admissible to prove the discharge and satisfaction of a mortgage bond.⁵ The Bombay and the Lahore High Courts have held that a subsequent agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract and oral evidence is inadmissible in proof of it.⁶ The Bombay High Court has subsequently held that where all that the defendant wants to prove is some fact tending to show that the obligation has been discharged, either by payment, or by remission of anything that was due, such fact may be proved as not amounting to a modification of the conditions of the mortgage but relating mainly to the discharge of the contract, and not involving any question of its terms.⁷ A full bench of the Allahabad High Court has held that an agreement between parties to a mortgage deed cannot be proved by oral evidence to show that on payment of a sum of money less than what would be due on calculating the correct amount of principal and interest at the stipulated rate entered in the mortgage deed the debt would be discharged. Such evidence would be admissible to prove the satisfaction of the debt, as resulting from a mutual agreement by which the mortgagee accepted, in full discharge of the obligation, payment of a part of the sum due and remitted the balance. A plea of such agreement and satisfaction is not one setting up an agreement contradicting, varying, adding to or subtracting from the terms of the contract of mortgage and does not contravene the provisions of this section.⁸ A debtor cannot prove that his creditor agreed verbally to take less, but he can prove that the creditor actually did accept less in full satisfaction.

A subsequent agreement between the parties by which the mortgagee was put in possession of the mortgaged property in order that he may enjoy the profits and devote the amount realised towards satisfaction of the interest is not illegal as there is nothing in such an agreement which varies, contradicts, or adds to the terms

¹ *Goseti Subba Row v. Varigonda Narasimham*, (1903) 27 Mad. 368, 370.

² *Per Boddam, J.*, in *Goseti Subba Row v. Varigonda Narasimham*, *ibid.*

³ *Mayandi Chetti v. Oliver*, (1898) 22 Mad. 261.

⁴ *Maung Myat Tun Aung v. Maung Lu Pu*, (1925) 3 Ran. 243.

⁵ *Ramlal Chandra Karmakar v. Gobinda Karmakar*, (1900) 4 C. W. N. 304; *Mahim v. Ram Dayal*, (1925) 42 C. L. J. 582, 30 C. W. N. 371; *Srimati Bhaba Sundari v. Ram Kamai Dutta*, (1925) 44 C. L. J. 269; *Bala-sundara Naiker v. Ranganatha Aiyar*,

(1929) 53 Mad. 127; *Munuswami Mudaliar v. Govindaraja Chettiar*, (1934) 58 Mad. 371.

⁶ *Jagannath v. Shankar*, (1919) 44 Bom. 55, 22 Bom. L. R. 39; *Ghanaya Lal v. Rallia Ram*, (1928) 9 Lah. 597. But see *Sukhlal v. Jetha*, (1928) 30 Bom. L. R. 1455.

⁷ *Sukhlal v. Jetha*, (1928) 30 Bom. L. R. 1455, 1462.

⁸ *Collector of Etah v. Kishori Lal*, (1930) 53 All. 157, F.B., *Jwala Prasad v. Mohan Lal*, (1926) 48 All. 705, disapproved.

of the original deed. Such an agreement is in furtherance of one of the conditions of the mortgage and this proviso does not apply to it.¹

New contract.—This proviso does not exclude evidence of a subsequent oral agreement substituting a new contract for one reduced to writing and registered according to law, the said proviso only referring to a subsequent oral agreement to rescind or modify such contract.² The distinction between a substituted new agreement by novation and the mere alteration of an old contract is that in the former case the old contract is extinguished, while in the latter it remains binding subject to the alteration which the parties have agreed to.³ According to the Rangoon, the Lahore and the Bombay High Courts a judgment-debtor can set up a new verbal agreement by the decree-holder to accept some variation or a new contract in substitution of the original decree,⁴ but not according to the Allahabad High Court.⁵

CASES.—**Extraneous evidence admissible.**—A receipt which purported to show that simple and not compound interest was to be charged (though the mortgage-bond contained provision for the payment of compound interest), was held to be admissible in evidence.⁶ The receipt did not require registration and was therefore admissible in evidence. It operated as a waiver.

Extraneous evidence not admissible.—A lease contained a covenant for renewal of the lease whereby if the lessee desired to renew the lease he should give three months' notice in writing of his intention to do so. The lessee, however, failed to observe this covenant and relied on an oral agreement between himself and his lessors for renewal of the lease. It was held that evidence of such oral agreement was not admissible.⁷ A agreed by a registered deed to give B for her life an annual amount by way of maintenance, and subsequently it was agreed orally that B should enjoy certain lands in lieu of such maintenance and B was put in possession. In a suit by B to recover arrears of maintenance from A it was held that the subsequent oral agreement was an agreement to rescind or modify the original registered agreement and was not receivable in evidence.⁸

Proviso 5.—Parole evidence of usage or custom is admissible in aid of the construction of a written instrument. Such evidence is received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind,—when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted according to the recognised practice and usage with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties.⁹ “But the rule for admitting evidence of usage must be taken always with this qualification,

¹ *Sahib Din v. Sri Dhanush Dharaji*, (1947) 23 Luck. 74.

² *Jaggat Singh v. Devi Ditta Mal*, (1883) P. R. No. 169 of 1883 (Civil).

³ *Lakhu Ram v. Amir Khan*, (1888) P. R. No. 14 of 1889 (Civil).

⁴ *Ma Shwe Pee v. Maung San Myo*, (1928) 6 Ran. 573; *Abdul Karim v. Hakam Mal-Tani Mal*, (1933) 14 Lah. 668; *Kalyanji Dhana v. Dharamsi Dhana & Co.*, (1934) 37 Bom. L. R. 230.

⁵ *Lachman Das v. Baba Ramnath Kalikamlwala*, (1921) 44 All. 258.

⁶ *Kailash Chandra Nath v. Sheikh Chhenu*, (1914) 42 Cal. 546.

⁷ *Mark D'Cruz v. Jitendra Nath Chatterjee*, (1919) 46 Cal. 1079; *Karam-palli Unni Kurup v. Thekku Vittil Muthorakutti*, (1902) 26 Mad. 195.

⁸ *Kattika Papanamma v. Kattika Kristnamma*, (1906) 30 Mad. 231.

⁹ *Phillips*, 407.

that the evidence proposed is not repugnant to, or inconsistent with, the written contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication... where the incident sought to be annexed to a contract is unreasonable or illegal, it cannot be annexed to the contract by evidence of usage."¹

Proviso 6.—Where a document is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. But where the terms of the documents themselves require explanation, then evidence can be led within the restrictions laid down in this proviso.² The language of this proviso is rather vague. It is true that evidence of the circumstances surrounding a document is admissible; but it is admissible only for the purpose of throwing light on its meaning. It is not permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale-deed is intended to operate as a mortgage. There must be some limit to the suggestion that the surrounding circumstances can always be scrutinized so as to enable the Court to alter or change the nature of a document to something different from what it purports to be. Otherwise, there can be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous.³

Extrinsic evidence is receivable of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument; that is, to identify the persons and things to which the instrument refers.⁴ Previous correspondence between the parties for the purpose of explaining anything in a document before the Court is admissible.⁵

Deed of one kind to be deed of another kind.—Extrinsic evidence is admissible for the purpose of showing that a document, which purports to be, and on the face of it is, a deed of sale, is in reality a deed of gift.⁶ Oral evidence is admissible to show that a mortgage has been subsequently converted into a sale,⁷ or that what ostensibly purported to be a sale with an agreement for a re-sale and re-purchase at the same price at a certain date was a mortgage by conditional sale,⁸ or that two deeds of sale were in reality a deed of exchange.⁹

Sections 93-97 partly develop and partly restrict the principle laid down by this proviso.

CASE.—Where by a deed of settlement, almost the whole of the settlor's immoveable property was transferred to trustees together "with buildings and appurtenances thereto" and the question was raised as to whether certain specific properties were included in the deed, it was held that the ambiguity in the deed

¹ Best, 12th Edn., s. 228, p. 218; *Lu Gale v. Maung Mo*, (1904) 2 L. B. R. 268; *K. M. P. R. N. M. Firm v. Somasundaram Chetty & Co.*, (1924) 28 Mad. 275.

² *Ganpatrao v. Bapu*, (1919) 22 Bom. L. R. 831, 44 Bom. 710; *The Punjab National Bank, Ltd. v. Mr. S. B. Chaudhry*, (1943) 19 Luck. 265.

³ *Martand v. Amritrao*, (1925) 27 Bom. L. R. 951, 49 Bom. 652.

⁴ *Bank of New Zealand v. Simpson*, [1900] A. C. 182.

⁵ *Simla Bank Corporation, Ltd. v. H. T. Ball*, (1888) P. R. No. 2 of 1884

(Civil).

⁶ *Hanif-un-nisa v. Faiz-un-nis* (1911) 13 Bom. L. R. 391, 38 I. A. 85, 33 All. 340. See *Maung Kyin v. Ma Shwe La*, (1911) 38 I. A. 146, 13 Bom. L. R. 797; *Serafuddin Haldar v. Isab Haldar*, (1921) 49 Cal. 161.

⁷ *Badhawa Mal v. Hira*, (1883) P. R. No. 30 of 1884 (Civil).

⁸ *Narasingerji Gyanagerji v. Panuganti Parthasaradhi*, (1924) 51 I. A. 305, 47 Mad. 729, 27 Bom. L. R. 4.

⁹ *Kishan Lal v. Ram Lal*, (1927) 50 All. 59.

being latent, in construing the deed, the subsequent conduct of the parties there-to can be legitimately looked into under this proviso, for the purpose of ascertaining to what persons or things the expressions used therein were intended to apply.¹

Exclusion of evidence
to explain or amend
ambiguous document!

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

ILLUSTRATIONS.

(a) A agrees, in writing, to sell a horse to B for Rs. 1,000 or Rs. 1,500. Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

COMMENT.—Sections 93 to 98 deal with rules for construction of documents with the aid of extrinsic evidence.

There are two sorts of ambiguities of words,—the one is *ambiguitas patens* and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seems certain and without ambiguity, for anything that appears upon the deed or instrument; but there is some collateral matter out of the deed that breeds the ambiguity.² A good test of the difference is to put the instrument into the hands of an ordinary intelligent educated person. If, on perusal, he sees no ambiguity, but there is nevertheless an uncertainty as to its application, the ambiguity is latent; if he detects the ambiguity from merely reading the instrument it is patent. Thus, in illustration (b), the blanks would be patent ambiguities and they could not be filled in by parole testimony as to the intention of the parties, etc. In the illustration to s. 95, no one could detect any ambiguity from merely reading the instrument. The ambiguity does not consist in the language, but is introduced by extrinsic circumstances.³

Principle.—This section deals with patent ambiguities. If the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain.⁴

The duty of the Court is always interpretation; to find out not what really was the intention of the parties, as distinguished from what mere words expressed; but merely to find out the meaning of the words used by them.⁵ To put a construction on a document is to find out the meaning of the signs and words made upon it, and their relation to facts.⁶ The question is, not what was the intention of the parties, but what is the meaning of the words they have used.⁷

Extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the person and things to which the instrument refers, is admissible.⁸ Thus, where there is a written agreement to deliver a quantity of grain at a particular time, parole evidence is admissible under certain limitations to show what kind of grain the contracting parties had in their contemplation at the time the contract was made.⁹

¹ *Subramania Ayyar v. Raja Rajeswara Dorai*, (1916) 40 Mad. 1016.

² Best, 12th Edn., s. 226, p. 211.

³ Norton, s. 633, pp. 351, 352.

⁴ *Deojit v. Pitambar*, (1876) 1 All. 275.

⁵ *Doe dem. Gwillim v. Gwillim*,

(1833) 5 B. & Ad. 122, 129.

⁶ Stephen's Dig., Art. 91.

⁷ *Rickman v. Carstairs*, (1833) 5 B. & Ad. 651, 663.

⁸ *Valla Hataji v. Sidoji Kondaji*, (1868) 5 B. H. C. (A. C. J.) 87.

⁹ *Ibid.*

Sections 91 and 92 define the cases in which documents are exclusive evidence of the transactions which they embody. Sections 93-99 deal with the interpretation of documents by oral evidence.

Exclusion of evidence against application of document to existing facts.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

ILLUSTRATION.

A sells to B, by deed, "my estate at Rampur containing 100 bighas." A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

COMMENT.—**Principle.**—The words of a written instrument must be construed according to their natural meaning, and no amount of acting by the parties can alter or qualify words which are plain and unambiguous. No principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself.¹

Under this section evidence to show that common words, whose meaning is plain, not appearing from the context to have been used in a peculiar sense, have been in fact so used, is not admissible.² Where the language in its ordinary sense properly applies to the facts without any difficulty, evidence to show that it bears a different meaning will be rejected, as it contradicts the document.

The intention of the parties to a document whose language is plain and unambiguous, should be gathered from the language of the document itself, without resorting to surrounding circumstances for aid.³

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

ILLUSTRATION.

A sells to B, by deed, "my house in Calcutta."

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

COMMENT.—Sections 95, 96 and 97 deal with latent ambiguities. Section 95 and s. 92 contain important exceptions to the general rule laid down in s. 91.

Principle.—Where the language of a document is plain in itself but is unmeaning in reference to existing facts evidence may be given to show that it was used in a peculiar sense. It is based upon the maxim *falsa demonstratio non nocet* (a false description does not vitiate the document). Section 97 is a part of the rule in this section, and both the sections must be read together. The illustration to this section shows that if A sells to B "my house in Calcutta," and if A has no house in Calcutta but has a house in Howrah, of which B has been in possession since

¹ *North Eastern Railway v. Hastings* (Lord), [1900] A. C. 260, 263.

² Stephen's Dig., Art. 91.

³ *Babu v. Sitaram*, (1901) 3 Bom.

L. R. 768; *Narayan v. The Co-operative Central Bank, Malkapur*, [1938] Nag. 604.

the execution of the deed, these facts may be proved to show that the deed related to the house in Howrah.¹ Where a sale-deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show that the lands intended to be sold and actually sold and delivered were lands bearing different survey numbers.² Where there is sufficient description set forth of the premises by giving the name of the particular field or otherwise, a false description added thereto (e.g., the mention of a wrong survey number) may be rejected.³

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Evidence as to application of language which can apply to one only of several persons.

ILLUSTRATIONS.

(a) A agrees to sell to B, for Rs. 1,000, "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sind was meant.

COMMENT.—Principle.—Where the description in the document applies equally to any one of two or more subjects, evidence to explain its language is admissible. Where the language of a document, though intended to apply to one person or thing only, applies equally to two or more, and it is impossible to gather from the context which was intended, an equivocation arises, e.g., when the same name or description fits two persons or things accurately; when the same name or description fits one exactly and the other but tolerably; when the same name or description fits two objects equally but subject to a common inaccuracy, provided that the inaccuracy be a mere blank or applicable to no other person or thing.

This section modifies the rule laid down in s. 94 by providing that where the language of a document correctly describes two sets of circumstances but could not have been intended to apply to both, evidence may be given to show to which set it was intended to apply. Here the language is certain. The doubt as to which of similar persons or things the language applies has been introduced by extrinsic evidence.⁴

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

ILLUSTRATION.

A agrees to sell to B "my land at X, in the occupation of Y." A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

¹ *Karuppa Goundan alias Thoppala Goundan v. Periatambi Goundan*, (1907) 30 Mad. 397, 399.

² *Ibid.*

³ *Santaya v. Savitri*, (1902) 4 Bom. L. R. 871; *Mahabir Prasad v. Masat-*

ul-lah, (1915) 38 All. 108.

⁴ *Doe d. Hiscocks v. Hiscocks*, (1839), 5 M. & W. 363; *Nga Cho v. Mi Se Mi*, (1916) 2 U. B. R. 110; *Stephen's Dig.*, Art. 91.

COMMENT.—This section is based upon the maxim *falsa demonstratio non nocet*. It is only an extension of the provision of s. 95. Sections 95, 96 and 97 all deal with latent ambiguity. “Where in a written instrument the description of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author.”¹ The rule rejecting erroneous description not substantially important is applicable only where there is enough to show the intention clearly.

The illustration to this section shows that if A agrees to sell to B “my land at X, in the occupation of Y,” and A has land at X, but not in the occupation of Y, and has land in the occupation of Y but it is not at X, evidence may be given to show which was intended to be sold. Another common case is where land within certain boundaries is sold and is wrongly described as containing a certain area, the error in area is regarded as a mere misdescription and does not vitiate the deed. The maxim *falsa demonstratio non nocet* applies.²

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Evidence as to meaning of illegible characters, etc.

ILLUSTRATION.

A, a sculptor, agrees to sell to B, “all my mods.” A has both models and modelling tools. Evidence may be given to show which he meant to sell.

COMMENT.—**Principle.**—Evidence as to the meaning of illegible characters (e.g., shorthand-writer’s notes) or of foreign, obsolete, technical, local and provincial expression and of words used in a peculiar sense may be given. In such cases the evidence cannot properly be said to vary the written instrument; it only explains the meaning of expressions used. Mercantile usage has given special meanings to many ordinary words. Evidence of the meaning which these words bear in mercantile transactions can be given under this section.

The principle upon which words are to be construed in instruments is very plain—where there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the Court from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention.³

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Who may give evidence of agreement varying terms of document.

¹ Taylor, 12th Edn., s. 1226, p. 787.

30 Mad. 397.

² *Karuppa Goundan alias Thoppala Goundan v. Periatthambi Goundan*, (1907)

³ Per Fry, J., in *Holt & Co. v. Collyer*, (1881) 16 Ch. D. 718, 720.

ILLUSTRATION.

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C, if it affected his interests.

COMMENT.—Section 92 forbids the admission of evidence of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from, the terms of a written document as between the parties to such document or their representatives in interest. The rule of exclusion laid down in the section does not apply to the case of a third party who is not a party to the document. On the contrary, this section distinctly provides that persons who are not parties to a document may give evidence tending to show a contemporaneous agreement varying the terms of the document.¹

The principle of s. 92 does not apply to third persons. If it were otherwise, third persons might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and, therefore, ought not to be precluded from proving the truth, however contradictory it may be to the written statements of others.²

Varying.—In this section the word “varying” only is used, while in s. 92 the words are “contradicting, varying, adding to, or subtracting from”. But it is difficult to see that in using the term “varying” only, anything less could have been meant than what is conveyed by the several expressions in s. 92 and as every “contradicting,” “adding to,” or “subtracting from” would necessarily be a “varying” of the instrument, the Legislature apparently use that expression as sufficient to convey all that is denoted by the other different expressions occurring in the earlier section.³

CASES.—The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. It was held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale.⁴

In the case of an alienation of land in which a document has been executed purporting to be a deed of gift or of mortgage, it is open to a third party claiming to exercise a right of pre-emption to prove that the transaction was in reality one of sale, and that the document sought to be impugned was executed in order to conceal its real nature and to defraud him of his legal rights.⁵

100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

Saving of provisions of Indian Succession Act relating to wills.

COMMENT.—Act X of 1865 is replaced by Act XXXIX of 1925.

¹ *Bageshri Dayal v. Pancho*, (1906) 28 All. 473, 474.

² Taylor, 12th Edn., s. 1149, p. 735.

³ *Pathammal v. Syed Kalai Ravuthar*, (1903) 27 Mad. 329, 331; *Tara Chand v. Baldeo*, (1890) P. R. No. 117 of 1890, F.B. (Civil).

⁴ *Bageshri Dayal v. Pancho*, (1906) 28 All. 473, *Rahiman v. Elahi Baksh*,

(1900) 28 Cal. 70, dissented from; *Pathammal v. Syed Kalai Ravuthar*, (1903) 27 Mad. 329.

⁵ *Tara Chand v. Baldeo*, (1890) P. R. No. 117 of 1890, F.B. (Civil); *Parma Nand v. Airapat Ram*, (1899) P. R. No. 20 of 1899 (Civil); *Megha Ram v. Makhan Lal*, (1912) P. R. No. 67 of 1912 (Civil).

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.

OF THE BURDEN OF PROOF.

Burden of proof.
i.e. Burden of Establishing
a case
101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof¹ lies on that person.

ILLUSTRATIONS.

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true.

A must prove the existence of those facts.

COMMENT.—The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. This rule of convenience has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. Moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact, should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and not to its grammatical form, for in many cases the party, by making a slight alteration in the drawing of his pleadings, may give the issue a negative or affirmative form, at his pleasure.¹

The party on whom the onus of proof lies must, in order to succeed, establish a *prima facie* case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. He must succeed by the strength of his own right and the clearness of his own proof.

The general rule that a party who desires to move the Court must prove all facts necessary for that purpose (ss. 101-105) is subject to two exceptions:—

(a) he will not be required to prove such facts as are specially within the knowledge of the other party (s. 106); and

(b) he will not be required to prove so much of his allegations in respect of which there is any presumption of law (ss. 107-113), or in some cases, of fact (s. 114) in his favour.

1. 'Burden of proof.'—This expression means (a) the burden of establishing a case, and (b) the duty or necessity of introducing evidence. Burden of proof

¹ Taylor, 12th Edn., s. 364, p. 252.

is the obligation that a party lies under to produce evidence to satisfy the Court as to the existence or non-existence of a fact contended for by him. This burden will, at the beginning of a trial, lie on one party, but during the course of the trial it may shift from one side to the other.

The term *onus probandi*, in its proper use, merely means that, if a fact has to be proved, the person whose interest it is to prove it, should adduce some evidence, however slight, upon which a Court could find the fact he desires the Court to find. It does not mean that he shall call all conceivable or available evidence. It merely means that the evidence he lays before the Court should be sufficient, if not contradicted, to form the basis of a judgment and decree upon that point in his favour.¹ Where there is an admission by a party the burden of proof shifts and it is for the party making the admission to explain it away.²

It is for the prosecution to determine what witnesses it should call in support of its case. Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.³

In a case of rape, the Judge must caution the jury that it is dangerous to convict any man upon the uncorroborated testimony of the prosecutrix. The jury should be told that only in exceptional cases would they be justified in accepting such uncorroborated testimony. The kind of corroboration required by the rule must be independent evidence, that is to say, the evidence of some witness other than the prosecutrix herself. What the prosecutrix says to other persons is not corroborative evidence within the meaning of the rule.⁴ The Judge should also tell the jury that if they come to the conclusion that they believe the girl, and think the accused guilty, then they have the right to convict him on her uncorroborated evidence.⁵

Sued 102. The burden of proof in a suit or proceeding lies on that person
On whom burden of proof lies. who would fail if no evidence at all were given on either side.

ILLUSTRATIONS.

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

¹ *Unkar Nath v. Mitthu Lal*, (1898) 18 A. W. N. 107.

² *Chandra Kunwar v. Narpat Singh*, (1906) 29 All. 184, 34 I. A. 27, 9 Bom. L. R. 267; *Dukh Haran Nath Zutshi v. Messrs. Commercial Credit Corporation, Limited*, (1939) 15 Luck. 191.

³ *Seneviratne v. The King*, (1936) 39 Bom. L. R. 1, P.C.

⁴ *Noor Ahmad v. Emperor*, (1933) 62 Cal. 527; *Sakhinder Rai v. King-*

Emperor, (1939) 18 Pat. 698; *Emperor v. Kasamalli Mirzaalli*, (1941) 44 Bom. L. R. 27, [1942] Bom. 384, F.B.; *Emperor v. Mahadeo Tatyia*, (1941) 44 Bom. L. R. 216.

⁵ *Surendranath Das v. Emperor*, (1933) 62 Cal. 534; *Sikandar Miyan v. Emperor*, [1937] 2 Cal. 345; *Harendra Prasad Bagchi v. Emperor*, [1940] 2 Cal. 180; *Conroy v. King-Emperor*, [1945] Nag. 226.

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

COMMENT.—This section lays down a test for ascertaining on which side the burden of proof lies. The section makes it clear that the initial onus is on the plaintiff. If he discharges that onus and makes out a case which entitles him to relief, the onus shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

The burden of proof lies upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. This rule, derived from the maxim of Roman law, *ei incumbit probatio, qui dicit, non qui negat*, is adopted partly because it is but just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative.¹ The phrase "burden of proof" is used in two distinct meanings in the law of evidence, viz., the burden of establishing a case and the burden of introducing evidence. The burden of establishing a case remains throughout the trial where it was originally placed; it never shifts. The burden of evidence may shift constantly as evidence is introduced by one side or the other. In s. 101 the phrase is used in its first meaning, and in this section in the second sense.² When the evidence is all in, and a party introducing it has not, by the preponderance of evidence required by law, established his position or claim, the decision will be against him.

The party on whom the burden of proof lies begins.

The burden must be strictly discharged; in other words, the plaintiff, in order to succeed, must put the Court in possession of legal and satisfactory evidence, and it will not suffice to point to matters of suspicion or even to plausible conjecture.³

A party, on whom the burden of proof in the first instance lies, may shift the burden to the other side by proving facts giving rise to a presumption in his favour.⁴

CASES.—In a suit on a bond, the plaintiff accounted for the non-production of the bond, by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged he had paid it. It was held that the defendant was bound to begin and prove payment, either by the production of the bond or other evidence or by both.⁵

Where execution of a bond is admitted and the bond contains an admission that consideration had passed, it is for the executant to get rid of the admission which he has made in the bond. It is not enough for him to prove that, prior to the institution of a suit on the bond, he denied receipt of consideration, even if such denial was made before the registering officer.⁶ Where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration, the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration.⁷

¹ Phipson, 7th Edn., p. 30.

² *King-Emperor v. U Damapala*, (1936) 14 Ran. 666, F.B.

³ *Ramabai v. Ramchandra*, (1905) 7 Bom. L. R. 293; *Ali Khan Bahadur v. Indar Parshad*, (1896) 23 Cal. 950, 23 L. A. 92.

⁴ *Mano Mohun Ghose v. Mothura Mohun Roy*, (1881) 7 Cal. 225.

⁵ *Chuni Kuar v. Udai Ram*, (1883) 5 All. 73.

⁶ *Mahabir Prasad Rai v. Bishan Dayal*, (1904) 27 All. 71. See *Achaya v. Maung Po Saing*, (1920) 10 L. B. R. 264.

⁷ *Ram Chand v. Chhunnu Mal*, (1925) 6 Lah. 470, F.B., disapproving *Wazir Singh v. Jai Gopal*, (1887) P. R. No. 17 of 1888 (Civil).

It lies on him who asserts it to prove that the law of an Indian State differs from the law in British India, and in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature.¹

s. 103. 103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Burden of proof as to particular fact.

ILLUSTRATION.

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

COMMENT.—This section amplifies the general rule laid down in s. 101. It differs from s. 101. By s. 101 the party has to prove the whole of the facts which he alleges, to entitle him to judgment when the burden of proof is on him. This section provides for the proof of some one particular fact. The illustration sufficiently points out the meaning. All the facts, however numerous and complicated, which go to make up the accused's guilt, must be proved by the prosecution. If the accused wishes to prove a particular fact, his *alibi*, for instance, he must prove it. If the prosecutor wishes to prove the case, not by independent oral testimony, but by the isolated fact of the accused's admission, or if he wishes to throw that in as an additional fact, he must prove it.²

As an instance of a provision of law that the proof of a particular fact shall be upon a particular person, see s. 44 of the Criminal Procedure Code, which says that all persons shall give information of the commission of certain offences to the nearest police officer or Magistrate, and throws upon such persons the burden of proving reasonable excuse for not doing so.

Where an ignorant and illiterate person likely to come under the influence of anybody puts his thumb-mark on a document in token of execution, the usual presumption arising out of s. 114 of the Act cannot be drawn and the burden to prove execution and consideration lies on the person suing on the document and does not shift to the person whose thumb-mark the document bears.³

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Burden of proving fact to be proved to make evidence admissible.

ILLUSTRATIONS.

(a) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

COMMENT.—Principle.—Whenever it is necessary to prove any fact, in order to render evidence of any other fact admissible, the burden of proving that

¹ *Raghunath v. Varjivandas*, (1906) 80 Bom. 578, 8 Bom. L. R. 525.

² Norton, 289.

³ *Udebhan v. Vithoba*, [1939] Nag. 160.

fact is on the person who wants to give such evidence. The illustrations explain the meaning of the section.

This section should be read with cl. 2 of s. 136 and with the illustrations attached to that section.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions¹ in the Indian Penal Code, or within any special exception² or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Burden of proving that case of accused comes within exceptions.

ILLUSTRATIONS.

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on A.

COMMENT.—In criminal cases the burden of proof, using the phrase in its strictest sense, is always upon the prosecution and never shifts whatever the evidence may be during the progress of the case. When sufficient proof of the commission of a crime has been adduced and the accused has been connected therewith as the guilty party, then the burden of proof, in another and quite different sense, namely in the sense of introducing evidence in rebuttal of the case for the prosecution is laid upon him. The meaning of this section is that it is not for the prosecution to examine all possible defences which might be put forward on behalf of an accused person and to prove that none of them applies. But at the conclusion of all the evidence it is incumbent upon the prosecution to have proved their case. The test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution and has thereby earned his right to an acquittal.¹ But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or defence, that a general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception.² Thus, if a man takes away the life of another, he should

¹ *King-Emperor v. U. Damapala*, [1937] 14 Ran. 666, F.B.; *Emperor v. Dhondu*, (1927) 29 Bom. L.R. 713; *Emperor v. Yusuf Mian*, [1938] All. 681; *Ghulam Sarwar v. The Crown*,

[1937] Lah. 726; *Emperor v. Parbhoo*, [1941] All. 843, F.B.

² *Emperor v. Musammat Anandi*, (1923) 45 All. 329.

prove circumstances, if any, justifying his doing so. If the act is done in exercise of the right of private defence, it lies upon him to show that he did not exceed that right.¹

An accused person who at his trial had not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence, neither is the Court competent to raise such a plea on behalf of the appellant.²

Even when the accused denies, *in toto*, the act or acts alleged, if evidence of the existence of circumstances bringing the case within a general or special exception is to be found in the evidence for the prosecution, the Court must review the whole evidence and either acquit the accused or convict him of the minor offence as the case may be.³ This section does not relieve a Judge, even in cases where the accused has not pleaded that his case comes within any particular exception, from pointing out to the jury such facts in the evidence as might justify the jury in taking the view that the accused's case was covered by one or other exception.⁴

1. 'General Exceptions'.—The general exceptions here referred to are those applicable to all crimes, and are given in Chapter IV of the Indian Penal Code.

This section is a general provision which imposes the burden of bringing himself within an exception upon the person who relies upon the exception; and there is no distinction between a case in which the exception is contained in the body of the statute imposing the prohibition and a case in which it is not so included.⁵

2. 'Special exceptions'.—Special exceptions are those which are restricted to a particular crime.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Burden of proving fact especially within knowledge.

ILLUSTRATIONS.

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

COMMENT.—This section applies only to parties to a suit.⁶

Principle.—Where the knowledge of the subject-matter of an allegation is peculiarly within the province of one party to a suit, the burden of proof must lie there also. Thus, for example, sales of consignments entrusted to commission agents and particulars of those sales are matters which lie specially within their knowledge.⁷

It is the bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination.

¹ *Rameshwar v. King-Emperor*, (1935) 10 Luck. 718.

² *Queen-Empress v. Timmal*, (1898) 21 All. 122.

³ *King-Emperor v. U. Damapala*, (1936) 14 Ran. 666, F.B.

⁴ *Emperor v. Hasan Abdul Karim* (No. 2), (1944) 46 Bom. L. R. 566, F.B.

⁵ *Emperor v. Dahyabhai Savchand*,

(1941) 43 Bom. L. R. 519; *Government of Bombay v. Samuel*, (1946) 48 Bom. L. R. 746.

⁶ *Mahabir Singh v. Rohini Ramana-dhewaj Prasad Singh*, (1933) 35 Bom. L. R. 500, F.C.

⁷ *Mayen v. Alston*, (1893) 16 Mad. 238, 245.

His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case.¹

Inference from individual facts is in no way conclusive; but the intention underlying the conduct of any individual is seldom a matter which can be conclusively established and it is indeed only known to the person in whose mind the intention is conceived. But if the prosecution has established that the character and circumstances of an act suggest that it was done with a particular intention, then under ill. (a) to this section it may be assumed that he has that intention unless he proves the contrary.²

In a criminal case even where the facts lie peculiarly within the knowledge of the accused the burden of proof lies on the prosecution though very slight evidence may be sufficient to discharge the burden.³

Scope.—This section does not cast any burden on an accused person to prove that no crime was committed by proving facts specially within his knowledge; nor does it warrant the conclusion that if anything is unexplained, which the Court thinks the accused could explain, he ought therefore to be found guilty.⁴ It does not affect the onus of proving the guilt of the accused. That onus rests on the prosecution and is not shifted on to the accused by reason of this section.⁵

The burden of proving good faith lies upon the party who alleges it.⁶

CASES.—Several persons were found at eleven o'clock at night on a road just outside the city of Agra, all carrying arms concealed under their clothes. None of them had a license to carry arms, and none of them could give any reasonable explanation of his presence at the spot under the particular circumstances. It was proved that dacoities had been frequent and recent in the neighbourhood. It was held that they were guilty under s. 402 of the Indian Penal Code as it was not shown by them that the object for which they had assembled was not that of committing dacoity.⁷

In a suit against a railway company based on the allegation that certain property belonging to the plaintiff being at the time near the railway line, had been destroyed by reason of sparks flying from an engine, it was held that it was on the railway company to show that they had taken proper precautions to avoid damage to property adjacent to the line by reason of sparks from engines.⁸

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving death of person known to have been alive within thirty years.

COMMENT.—If a man is shown to have been alive within thirty years, the burden of proving him to be dead lies on the person affirming it.

¹ *Gurbaksh Singh v. Gurdial Singh* (1927) 29 Bom. L. R. 1392, P.C.

² *Jain Lal v. King-Emperor*, (1942) 21 Pat. 667.

³ *Provincial Government, Central Provinces and Berar v. Champalal*, [1946] Nag. 504.

⁴ *King-Emperor v. U. Damapala*, (1936) 14 Ran. 666. F.B.; *Shewaram v. Crown*, [1940] Kar. 249.

⁵ *Crown v. Santa Singh*, [1945] Lah. 137.

⁶ *Tha Dwe v. A. L. V. R. S. Allagappa Chetty*, (1907) 4 L. B. R. 211.

⁷ *Queen-Empress v. Bholu*, (1900) 23 All. 124.

⁸ *The Secretary of State for India in Council v. Dwarka Prasad*, (1927) 49 All. 559.

108. Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

COMMENT.—Sections 107 and 108 must be read together because the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together.

There is no presumption in law that a person was alive for seven years from the time when he was last heard of. These sections deal with the procedure to be followed when a question is raised before a Court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died. Assuming that the Court could make a presumption that a person was alive for seven years after he was last heard of, it depends on the circumstances of each case, whether the Court could draw such a presumption or not.¹

Section 107.—This section provides that if it appears that a person, whose present existence is in question, was alive within thirty years, and nothing whatever appears to suggest the probability of his being dead, the Court is bound to regard the fact of his still being alive as proved. But as soon as anything appears which suggests the probability of his being dead, the presumption disappears, and the question has to be determined on the balance of proof.²

Section 108.—If a person has not been heard of for seven years, there is a presumption of law that he is dead, and the burden of proving that he is alive is shifted to the other side. But at what time within that time he died is not a matter of presumption, but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.³ The presumption of death does not extend to the date of death.⁴ There is no presumption that he died at the end of the first seven years, or at any particular date⁵ or at any subsequent period.⁶

The earliest date to which the death can be presumed can only be the date when the suit to claim that right is filed. It cannot have a further retrospective effect.⁷

¹ *Veeramma v. Chenna Reddi*, (1912) 37 Mad. 440.

² Markby, 83.

³ *Rango v. Mudiyeppa*, (1898) 23 Bom. 296, 306; *Narayan v. Shrinivas*, (1905) 8 Bom. L. R. 226; *Jayawant Jivamrao v. Ramachandra Narayan*, (1915) 40 Bom. 239, 18 Bom. L. R. 14; *Gopal Bhimji v. Manaji Ganuji*, (1922) 47 Bom. 451, 25 Bom. L. R. 134; *Lalchand Marwari v. Mahanth Ramrup Gir*, (1925) 5 Pat. 312, 28 Bom. L. R. 855, 53 I. A. 24; *Ganesh Das Aurora*, In re, (1926) 54 Cal. 186; *Dharup Nath v. Gobind Saran*, (1886) 8 All. 614; *Fani Bhushan Banerji*

v. Surjya Kanta Roy Chowdhry, (1907) 35 Cal. 25; *Narki v. Lal Sahu*, (1909) 37 Cal. 103; *Basharat v. Najib Khan*, (1917) P. R. No. 38 of 1918 (Civil); *Tirathpathi v. Ranjit Singh*, (1930) 6 Luck. 407; *Punjab v. Natha*, (1931) 12 Lah. 718, F.B., overruling *Tani v. Rikhi Ram*, (1920) 1 Lah. 554.

⁴ *Ganesh Bux Singh, Thakur v. Mohammad*, (1944) 19 Luck. 531.

⁵ *Vithabai v. Malhar*, (1937) 40 Bom. L. R. 147, [1938] Bom. 155.

⁶ *Muhammad Sharif v. Bande Ali*, (1911) 34 All. 36, F.B.

⁷ *Jeshankar v. Bai Divali*, (1919) 22 Bom. L. R. 771.

The presumption of Muhammadan law that, when a person has disappeared and has not been heard of for a certain number of years, he is dead, and further that, as regards property coming to him by inheritance, he must be deemed to have died at the date of his disappearance, is a rule of evidence only and is superseded by this section.¹ The rule of Muhammadan law that a missing person is to be regarded as alive till the expiry of ninety years from the date of his birth is overruled by this section.² So is the rule of Hindu law that twelve years must elapse before an absent person, of whom nothing has been heard during this period, can be presumed to be dead.

CASE.—A, a Muhammadan, died in 1884, and his estate was divided amongst his heirs. B, the eldest son of A, had disappeared in 1870, and had not since been heard of; and under Muhammadan law, a share of the estate was set aside for him as a missing heir. C, the son of B, claimed this share, to which he would have been entitled, under Muhammadan law, if B had been alive at the time of A's death, but not otherwise. It was held that the special rules regarding burden of proof in s. 107 and this section could only be applied with reference to the date of the suit, and not to the question whether B was alive or dead on a specified prior date; and that the burden of proving that B was alive in 1884 lay upon C, who affirmed it.³

109. When the question is whether persons are partners,¹ landlord and tenant,² or principal and agent,³ and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.

COMMENT.—**Principle.**—When the existence of a personal relationship, or a state of things, is once established by proof, the law presumes that the relationship or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question. A partnership, tenancy, or agency, once shown to exist, is presumed to continue, till it is proved to have been dissolved.

1. 'Partners'.—Partnership once shown to exist is presumed to continue until the contrary is proved. After a firm is dissolved, the partners continue to be liable to third parties for any act done which would have been an act of the firm if done before the dissolution, until public notice of dissolution is given (s. 45, Indian Partnership Act, 1932).

2. 'Landlord and tenant'.—Where the relationship of landlord and tenant is admitted or proved to exist it will be presumed to continue until it is shown by affirmative proof that it has ceased to exist. Mere non-payment of rent, though for many years, is not sufficient to show that such relationship has ceased.⁴

3. 'Principal and agent'.—Where an authority to do an act is once shown to exist, it is presumed to continue until the contrary is proved. Sections 182-238 of the Indian Contract Act deal with the relationship of principal and agent. Section

¹ *Mairaj Fatima v. Abdul Wahid*, (1921) 48 All. 673; *Azizul Hasan v. Mohammad Faruq*, (1933) 9 Luck. 401.

² *Mazhar Ali v. Budh Singh*, (1884) 7 All. 297, F.B.

³ *Moolla Cassim bin Moolla Ahmed v. Moolla Abdul Rahim*, (1905) 32 I. A. 177, 7 Bom. L. R. 892, 33 Cal. 173.

⁴ *Rungo Lall Mundul v. Abdool Guffoor*, (1878) 4 Cal. 314; *The British India Steam Navigation Company v. Hajee Mahomed Esack and Company*, (1881) 3 Mad. 107; *Attar Singh v. Ramditta*, (1881) P. R. No. 110 of 1881 (Civil).

206 provides that a reasonable notice must be given of revocation or renunciation of agency. Section 208 provides when the authority of an agent is terminated.

110. When the question is whether any person is owner of anything of which he is shown to be in possession,¹ the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

COMMENT.—This section gives effect to the principle that possession is prima facie evidence of a complete title; anyone who intends to oust the possessor must establish a right to do so.¹ This is to be presumed from lawful possession until the want of title or a better title is proved.²

The principle of the section does not apply where the possession has been obtained by fraud or force.]

The term 'possession' in this section is to be understood as opposed to juridical possession and to denote actual present possession.

A person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable.³

Possession is prima facie proof of ownership; it is so, because it is the sum of acts of ownership. This applies both to prior and to present possession. Possession has a two-fold value: it is evidence of ownership, and is itself the foundation of a right to possession. To recover possession a plaintiff must show a better right in himself to possession than is in the defendant. He may, within the period prescribed by the Limitation Act, show that, in a case where he is dispossessed, either by establishing title or by showing a prior legal possession entitling him to be restored to the same.⁴

There is a conflict of opinion between the High Courts as to whether a plaintiff in a suit for possession of immoveable property, other than a suit under s. 9 of the Specific Relief Act (I of 1877), is entitled to succeed merely upon proof of previous possession and dispossession by the defendant within twelve years prior to the suit, or whether he is bound to prove title.

A full bench of the Bombay High Court has held that possession is a good title against all persons except the rightful owner, and entitles the possessor to maintain ejectment against any person other than such owner who dispossesses him.⁵ A person, although suing more than six months after the date of dispossession

¹ *Ramchandra Appaji v. Balaji Bhaurao*, (1884) 9 Bom. 137; *Hassan v. Fazal Wahid*, (1882) P. R. No. 121 of 1882 (Civil); *Pir Baksh v. Jhanda Mal*, (1882) P. R. No. 157 of 1882 (Civil); *Nihal Chand v. Tejpu*, (1883) P. R. No. 74 of 1883 (Civil); *Nihal Singh v. Jiwanda*, (1888) P. R. No. 116 of 1888 (Civil); *Ram Chand v. Bhana Mal*, (1900) P. R. No. 71 of 1900 (Civil); *U Nyo v. Ma Shwe Meik*, (1899) P. J. L. B. 514; *Ma Ba v. Maung Kun*, (1889) S. J. L. B. 474; *Maung Ya Baing v. Ma Kyin Ya*, (1895) 2 U. B. R. (1892-96) 234; *Ma Hla Gywe v. Ma Thaik*, (1896) 2 U. B. R. (1892-96) 377; *Maung Thit v.*

Maung Kin, (1898) 2 U. B. R. (1897-1901) 412; *Maung Nwe v. Maung Po Gyi*, (1897) 2 U. B. R. (1897-1901) 416; *Maung Lu Pe v. Maung Lu Gale*, (1899) 2 U. B. R. (1897-1901) 418; *Ma Ngwe Zan v. Mi Shwe Taik*, (1910) 1 U. B. R. (1910-1913) 61.

² *Jodh Singh v. Sundar Singh*, (1882) P. R. No. 122 of 1882 (Civil).

³ *Gobind Prasad v. Mohan Lal*, (1901) 24 All. 157.

⁴ *Hari v. Dhondi*, (1905) 8 Bom. L. R. 96.

⁵ *Pemraj Bhavaniram v. Narayan Shivaram Khisti*, (1882) 6 Bom. 215, F.B.; *Vithoba v. Narayan*, (1883) P. J. 262; *Sakalchand Jetha v. Sunderlat*

and without resorting to a possessory suit,¹ is entitled to rely on the possession previous to his dispossession as against a person who has no title.² The view of the Bombay High Court is in accordance with the English law. The effect of the Bombay cases is that when there is wrongful ouster of the person in possession, the person who comes into Court to oust such tort-feasor need not prove more than his possession of the land in dispute, and that he had been ousted by the defendant, and that the plaintiff's prior possession was *prima facie* evidence of his title. According to this view, it is not necessary to show title in the absence of any title shown by the defendant. The word 'possession' denotes actual present possession. In *Hanmantrav v. The Secretary of State for India*,³ Jenkins, C. J., said: "To say that a possession is not within the meaning of section 110, unless it is a possession according to title, would be to render that section meaningless, and to introduce a doctrine subversive of the established principles of property law." But Ranade, J., struck a different note: "Under section 110, possession, when long and continued up to a recent date, leads to a presumption of title. Where the conflict is between mere previous possession and recent actual possession, the fact of previous possession will not entitle plaintiff to a decree except in suits under section 9, Act I of 1877, brought within six months from dispossession. Where this period is exceeded before a suit is brought, and is less than the limitation law requires, he must make out a *prima facie* title... And section 110 [Evidence Act] refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such *prima facie* title to claim a decree where no superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and the plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *prima facie* title is made out... Where no such title is made out, and plaintiff comes to the Court and asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof."⁴ This means that possession must be of such a character as leads to a presumption

Jetha, (1889) P. J. 309; *Ramchandra Narayan v. Narayan Mahadeo*, (1886) 11 Bom. 216; *Krishnacharya v. Lingawa*, (1895) 20 Bom. 270; *Ambalal v. The Secretary of State*, (1899) 1 Bom. L. R. 45; *Basapa v. Basapa*, (1900) 2 Bom. L. R. 410; *Fatan v. Emad*, (1901) 3 Bom. L. R. 246.

¹ Specific Relief Act, s. 9.

² *Krishnarav Yashwant v. Vasudeo Apaji Ghotikar*, (1884) 8 Bom. 371, *Pemraj Bhavaniram v. Narayan Shivaram Khisti*, (1882) 6 Bom. 215, F.B., followed, and *Dadabhat Narsidas v. The Sub-Collector of Broach*, (1870) 7 B. H. C. (A. C. J.) 82, dissented from; *Wa Tha v. Pe Hlaw*, (1905) 3 L. B. R. 27.

³ (1900) 25 Bom. 287, 290, 2 Bom. L. R. 1111, 1114; *Ali v. Pochubibi*, (1903) 5 Bom. L. R. 264; *Rajaram v. Nanchand*, (1903) 5 Bom. L. R. 225, 227, 28 Bom. 201.

⁴ *Hanmantrav v. The Secretary of State for India*, (1900) 25 Bom. 287,

303, 2 Bom. L. R. 1111, 1126; *Achut v. Shivajirao*, (1936) 39 Bom. L. R. 224. In an ejectment suit the defendant, though a trespasser, is entitled to require the plaintiff who seeks to eject him to prove that he has a superior title: *Kalu v. Barsu*, (1894) 19 Bom. 803. Plaintiff in an action of ejectment must recover by the strength of his own title, not the weakness of his adversary's: *Jowala Bulsh v. Dharum Singh*, (1866) 10 M. I. A. 511; *Thakur Basant Singh v. Mahabir Pershad*, (1913) 15 Bom. L. R. 525, 530, 40 I. A. 86, 35 All. 273; *Dharni Kania v. Gobar Ali*, (1912) 15 Bom. L. R. 445, F.C.; *Ramchandra v. Vinayak*, (1914) 16 Bom. L. R. 863, 900, 41 I. A. 290, 42 Cal. 384; *Bapuji v. Bhagvanti*, (1918) 20 Bom. L. R. 346, 42 Bom. 357. The plaintiff must establish such title as carries a present right to possession: *Sitaram v. Sadhu*, (1913) 16 Bom. L. R. 132, 38 Bom. 240.

of title.¹ Possession by itself may in some cases be sufficient to relieve the person who has been in possession from the necessity of proving his title. This applies to suits in ejectment, though it has a very limited and occasional operation. When a person who has lost possession sues to recover it, he cannot rest upon his prior possession alone, unless it was such as to amount to *prima facie* evidence of title. In such a case both title and possession have to be proved. Although the presumption that title goes with possession may come to the assistance of a person who has had possession but has lost it, it is open to the defendant who is in possession at the date of the suit to disprove the plaintiff's title. If the plaintiff's title is disproved, he cannot succeed on the basis of his possession only.²

The Calcutta High Court has held that mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under s. 9 of the Specific Relief Act.³ In a suit to recover possession brought more than six months after the date of dispossession, the plaintiff must prove title, and mere previous possession for any period short of the statutory period of twelve years cannot be sufficient for the purpose.⁴ Thus in cases other than possessory suit under the Specific Relief Act the plaintiff must show title or such adverse possession as confers a title under the Limitation Act.

The Madras High Court has held that, as against a wrong-doer, prior possession of the plaintiff in an action of ejectment is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of, and the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. It is immaterial however short or recent the plaintiff's possession was.⁵

The Allahabad High Court has held that s. 9 of the Specific Relief Act does not debar a person who has been ousted by a trespasser from the possession of immovable property to which he has merely a possessory title, from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession.⁶

The Patna High Court has held that a plaintiff who has omitted to sue under s. 9 of the Specific Relief Act, when first dispossessed, is not debarred from relying, in a suit for ejectment, on this section. As soon as he has proved that the defendant has dispossessed him the onus is thrown upon the latter to prove his title.⁷

¹ *Vasta v. Secretary of State for India*, (1920) 45 Bom. 789, 23 Bom. L. R. 238.

² *Govindbhai v. Dahyabhai*, (1935) 38 Bom. L. R. 175, [1937] Bom. 402.

³ *Ertaza Hossein v. Bany Mistry*, (1882) 9 Cal. 130; *Debi Churn Boido v. Issur Chunder Manjee*, (1882) 9 Cal. 39; *Purmeshur Chowdhry v. Brij Lal Chowdhry*, (1883) 17 Cal. 256.

⁴ *Nisa Chand Gaita v. Kanchiram Bagani*, (1899) 26 Cal. 579, 584; *Shama Churn Roy v. Abdul Kabeer*, (1898) 3 C. W. N. 158. Doubt has been expressed as to the correctness of the view taken in *Nisa Chand's* case in *Shyama Charan Ray v. Surya Kanta Acharya*, (1910) 15 C. W. N. 163; *Manik Borai v. Bani Charan Mandal*,

(1910) 13 C. L. J. 649, and *Adhar Chandra Pal v. Dibakar Bhuyan*, (1913) 41 Cal. 394. But it has been approved of in *Naba Kishore Tilakdas v. Paro Bewa*, (1922) 50 Cal. 23.

⁵ *Narayana Row v. Dharmachar*, (1902) 26 Mad. 514. See *Krishna Aiyar v. The Secretary of State for India*, (1909) 33 Mad. 173.

⁶ *Wali Ahmad Khan v. Ajudhia Kandu*, (1891) 13 All. 537. See *Lachho v. Har Sahai*, (1887) 12 All. 46; *Gobind Prasad v. Mohan Lal*, (1901) 24 All. 157.

⁷ *Haradhan Mandal Modak v. Iswar Das Marwari*, (1916) 2 P. L. J. 61; *Bodha Ganderi v. Ashloke Singh*, (1926) 5 Pat. 765.

The Privy Council has laid down in a case in which the plaintiff was a purchaser in possession and the defendant had no title at all, that lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree and an injunction restraining the wrong-doer.¹ In this case the plaintiff was in possession when he brought his suit and he asked for a decree declaring his right, and an injunction restraining the defendant from disturbing his possession.

CASES.—Where a vendee of immoveable property sues for possession, his vendor not having been in possession at the time of the sale, it lies upon him to show that his vendor was in possession at some period within twelve years prior to the date of the suit.²

The plaintiffs sued the Government for a declaration that a certain piece of land belonged to them and that they might be confirmed in their possession, alleging that they had purchased the site for Rs. 20 in 1888 from one D whose father had mortgaged it for Rs. 20 to the plaintiff's father. It was held that the possession of the plaintiffs being peaceable and obtained without ousting anyone, it was of such a character as to attract the presumption described in this section, and was good against the whole world except the person who could show a better title, and that, as the Government had failed to establish their title to the land, the plaintiffs were lawfully entitled to its possession.³

S obtained a money decree against the sons and heirs of A, and under that decree attached a shop as part of A's estate. N (father of A) applied to have the attachment removed alleging that the shop was his. The application was rejected and the shop was sold in execution, and bought by P, the defendant. N then brought his suit against P to establish his title. It was held that the plaintiff having proved his possession at the date of the execution sale, it lay upon P, who claimed the property, to prove a title in himself or in the judgment-debtor A, and that, he having failed to do this, the plaintiff was entitled to a decree declaratory of his right to the property as against the defendant.⁴

111. Where there is a question as to the good faith of a transaction

Proof of good faith in transactions where one party is in relation of active confidence.

between parties, one of whom stands to the other in a position of active confidence,¹ the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

ILLUSTRATIONS.

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

¹ *Ismail Ariff v. Mahomed Ghause*, (1893) 20 I. A. 99, 20 Cal. 834; *Sundar v. Parbati*, (1889) 12 All. 51, 16 I. A. 186.

² *Deba v. Rohtagi Mal*, (1906) 28 All. 479.

³ *Hanmantrao v. Secretary of State for India*, (1900) 2 Bom. L. R. 1111,

25 Bom. 287.

⁴ *Pemraj Bhavaniram v. Narayan Shivaram Khisti*, (1882) 6 Bom. 215, F.B.; *Krishnarao Yashwant v. Vasudev Apaji Ghotikar*, (1884) 8 Bom. 371; *Maung Min Din v. Maung On Gaing*, (1899) 2 U. B. R. (1897-1901) 421.

COMMENT.—Principle.—The principle of the rule embodied in this section which was called “the great rule of the Court” is “he who bargains in a matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence ; a rule applying to trustees, attorneys, or any one else”.¹ Where a fiduciary or quasi-fiduciary relation exists, the burden of sustaining a transaction between the parties rests with the party who stands in such relation and is benefited by it. The plaintiff having been entirely in the hands of the defendant, would be destitute of the means of proving affirmatively the *malâ fides* of the transaction ; whilst the defendant in such a transaction may fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he has done so.² In such cases it is seldom, if ever, possible to prove specific acts of deception, or of exercise of authority amounting to moral coercion. Yet the risk of abuse is obviously great. The law therefore reverses its usual rule of evidence in dealings between man and man. Commonly we do not presume, without specific indications, that there is anything contrary to good faith in transactions which on the face of them are regular... But this is the rule as between equals, persons who are capable of dealing with one another, as the accustomed forensic phrase goes, “at arm’s length.” When one party habitually looks up to the other and is guided by him, he can no longer be supposed capable, without special precautions, of exercising that independent judgment which is requisite for his consent to be free.³

1. ‘Active confidence’.—These words indicate that the relationship between the parties must be such that one is bound to protect the interests of the other. This has been held to apply to a trustee, an executor, an administrator, a guardian, an agent, a minister of religion, a medical attendant, an auctioneer, and an attorney. Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them.⁴

Pardanashin ladies.—In the case of deeds and powers executed by *pardanashin* ladies, it is requisite, that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who executed them.⁵

¹ *Gibson v. Jeyes*, (1801) 6 Ves. Jun. 266, followed in *Nisar Ahmad Khan v. Mohan Manucha*: *Mohan Manucha v. Nisar Ahmad Khan*, (1940) 43 Bom. L. R. 465, 469, p.c.

² Markby.

³ Pollock’s Law of Fraud in British India, pp. 68-64.

⁴ *Raghunathji v. Varjiwandas*, (1906) 8 Bom. L. R. 525, 30 Bom. 578; *Hoti Lal v. Mussammatt Ram Piari*, (1903) P. R. No. 77 of 1903 (Civil).

⁵ *Sudisht Lal v. Musummat Sheobarat Koer*, (1881) 8 I. A. 39, 7 Cal. 245; *Anmoda v. Bhuban*, (1901) 3 Bom. L. R. 386, 28 I. A. 71, 28 Cal. 546; *Shambati v. Jago Bibi*, (1902) 4 Bom. L. R. 444, 29 I. A. 127, 29 Cal.

749; *Sumsuddin v. Abdul*, (1906) 8 Bom. L. R. 781, 31 Bom. 165; *Mirza Sajjad Ali v. Nawab Wazir Ali*, (1912) 14 Bom. L. R. 1055, 39 I. A. 156, 34 All. 455; *Kali Bakhsh v. Ram Gopal*, (1913) 16 Bom. L. R. 147, 41 I. A. 23, 36 All. 81; *Sunitabala Debi v. Dharasundari Debi*, (1919) 22 Bom. L. R. 1, 46 I. A. 272, 47 Cal. 175; *Kamawati v. Digbijai Singh*, (1921) 24 Bom. L. R. 626, 48 I. A. 381, 43 All. 525; *Farid-un-nisa v. Mukhtar Ahmed*, (1925) 28 Bom. L. R. 193, 52 I. A. 342, 47 All. 703; *Ramanamma v. Viranna*, (1931) 33 Bom. L. R. 960, p.c.; *Tara Kumari v. Chandra Mauleshwar Prasad*, (1931) 34 Bom. L. R. 222, 11 Pat. 227, 58 I. A. 450; *Sheoparsan Singh v. Narsingh Sahai*, (1932) 34 Bom. L. R. 890, p.c.;

In the case of a *pardanashin* lady the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest not with those who attack, but with those who found upon a deed executed by her, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed, but was explained to and was really understood by her.¹ Even in cases where a *pardanashin* lady had independent advice, the Court will scrutinize the transaction very closely to see that it is a fair one.² Her free and intelligent consent to a transaction is necessary.³

CASE.—In a suit for cancellation of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was well advanced in years, and the defendant was his spiritual adviser. The gift comprised the whole of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world. Almost immediately after the execution of the deed the plaintiff repudiated it, and sued for its cancellation on the ground of fraud. It was held that, having regard to the fiduciary relation subsisting between the parties, the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and, in the absence of such proof, the plaintiff was entitled to obtain cancellation of the deed.⁴

112. The fact that any person was born during the continuance of a valid marriage¹ between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried,² shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other³ at any time when he could have been begotten.

COMMENT.—Principle.—This section is based on the principle that when a particular relationship, such as marriage, is shown to exist, then its continuance must *prima facie* be presumed.⁵ Under the section the fact that any person was born

(a) during the continuance of a valid marriage between his mother and any man, or

(b) within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless the parties had no access to each other at any time when he could have been begotten.

Evidence that a child is born during wedlock is sufficient to establish its legitimacy, and shift the burden of proof to the party, seeking to establish the contrary.

Sections 41, 112 and 113 are the only sections which deal with matters which are to be regarded as "conclusive proof". No rule of the kind can be based on

Kundan Lal v. Musharrafi Begam, (1936) 38 Bom. L. R. 783, 63 I. A. 826, 11 Luck. 346; *A. V. Palanivelu v. Neelaratni*, (1937) 39 Bom. L. R. 720, P.C.; *Shirangawa v. Basangouda*, (1937) 40 Bom. L. R. 732.

¹ *Bank of Khulna, Ltd. v. Jyoti Prakash Mitra*, (1940) 42 Bom. L. R. 1139, P.C.; *Tulshiram v. Chunnilal*, [1940] Nag. 146.

² *Nathusa v. Mohammad Siddique*, [1941] Nag. 418.

³ *Hem Chandra Chaudhuri v. Suradhani Debya Chaudhari*, (1940) 42 Bom. L. R. 993, P.C.

⁴ *Mannu Singh v. Umadat Pande*, (1890) 12 All. 523.

⁵ *Bhima v. Dulappa*, (1904) 7 Bom. L. R. 95.

considerations of evidence, because enquiry is altogether excluded. The basis of the rule in the first case (s. 112) seems to be a notice that it is undesirable to enquire into the paternity of a child whose parents 'have access' to each other. This section refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child; the latter point of time has to be considered only to see whether the husband had not access to the mother.¹

1. 'During the continuance of a valid marriage'.—The presumption as to paternity in this section only arises in connection with the offspring of a married couple. The section applies to the legitimacy of the children of married persons only.² On the birth of a child during marriage the presumption of legitimacy is conclusive, no matter how soon the birth occurs after the marriage.³ Under the section the child born in wedlock should be treated as the child of the father who was, at the time of its birth, the husband of the mother, unless it is shown that he had no access to the mother at the time of its conception quite irrespective of the question whether the mother was a married woman or not at the time of the conception.⁴

In the leading case of *Russell v. Russell*, it has been laid down that neither the declarations of the wife, nor her testimony that the child was the child of a man other than her husband are admissible, nor of the husband that he was not father of the child.⁵ The Allahabad High Court has held that the English rule that such evidence is inadmissible because it is evidence which tends to bastardise the child is not applicable to the Courts in India; there is nothing in the Indian Evidence Act which renders this evidence inadmissible. In a suit for divorce by the husband on the ground of the wife's adultery, alleged to be established by the fact of her having given birth to an illegitimate child, evidence by the husband of non-access to the wife at any time when the child could have been begotten is admissible; and an admission by the wife that the child is illegitimate is also admissible in evidence.⁶

A person claiming as an illegitimate son must establish his alleged paternity in the same manner as any other disputed question of relationship is established.⁷ The presumption that children born of a married woman, during the lifetime of her husband are the legitimate offspring of that woman and her husband, is not conclusive proof of their legitimacy and must be regarded as fully rebutted where the woman admittedly lived for years with another person and they both asserted such children to be the offspring of their union.⁸ It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage.⁹

2. 'Within two hundred and eighty days after its dissolution, the mother remaining unmarried'.—The section does not lay down a maximum period of gestation, and therefore does not bar the proof of the legitimacy of a child

¹ *Palani v. Sethu*, (1924) 47 Mad. 706; *Pal Singh v. Jagir*, (1926) 7 Lah. 368.

² *X X X v. Ma. Son*, (1896) 1 U. B. R. (1892-1896) 74.

³ *Umra v. Muhammad Hayat*, (1907) P. R. No. 79 of 1907 (Civil).

⁴ *Palani v. Sethu*, supra; *Musamat Masooma Begam v. Mohammad Raza*, (1941) 17 Luck. 416.

⁵ [1924] A. C. 687; *Sweeney v. Sweeney*, (1935) 62 Cal. 1080.

⁶ *Doutre v. Doutre*, [1939] All. 573.

⁷ *Gopalasami Chetti v. Arumachellam Chetti*, (1903) 27 Mad. 32, 33.

⁸ *Bahadur Singh v. Viru*, (1905) P. R. No. 28 of 1906 (Civil).

⁹ *Thakur Amjal v. Nawab Ali Khan*, (1906) 9 Bom. L. R. 264, P.C.

born more than two hundred and eighty days after dissolution of marriage, the effect of the section being merely that no presumption in favour of legitimacy is raised, and the question must be decided simply upon the evidence for and against legitimacy.¹ A person born within two hundred and eighty days after the death of his father is presumably his legitimate son.² When a person claims, under this section, to be the son of a deceased person, he must prove that he was born within two hundred and eighty days after the death of his father.³

3. 'Unless it can be shown that the parties to the marriage had no access to each other'.—By 'having no access' is meant having no opportunity of sexual intercourse; and in order to displace the conclusive presumption it must be shown that no such opportunity occurred down to a point of time so near to the birth as to render paternity impossible. To rebut the legal presumption under this section, it is for those, who dispute the paternity of the child, to prove non-access of the husband to his wife during the period when, with respect to the date of its birth, it must, in the ordinary course of nature, have been begotten.⁴ The word 'access' means effective access. Physical incapacity to procreate amounts to non-access within the meaning of the section.⁵ Where a child was born two hundred and twenty-three days after the death of the husband, the burden of proof lay on him who disputed the paternity of the child.⁶ If the husband has had access, adultery on the wife's part will not justify a finding that another man was the father.⁷

A wife can be examined to prove non-access of her husband during her married life, without independent evidence being first offered to prove the illegitimacy of the children.⁸ She is a competent witness to prove access or non-access by her husband.⁹ The Calcutta High Court has held that the section neither says in terms, nor even suggests that it would be open to a husband himself to give evidence tending to show that he neither had nor could have had access to his wife at the time when the child was conceived. The words "unless it can be shown that the parties . . . had no access, etc." mean no more than that evidence to that effect may be given but only if such evidence is not otherwise inadmissible.¹⁰ Under the common law neither husband nor wife can be examined for the purpose of proving non-access during marriage. In England the presumption of legitimacy may be rebutted by proof of the impotency of the husband.

The principle of this section does not apply to the case of a paramour and the presumption can be rebutted when the mother of the child is not a wife but

¹ *Rahmat Ali v. Musst. Allahdi*, (1883) P. R. No. 1 of 1884 (Civil).

² *Ghulam Mohy-ud-Din Khan v. Khizar Hussain*, (1928) 10 Lah. 470; *Misir Bhairon Prasad v. Gopi Kunwar*, (1930) 32 Bom. L. R. 871, p. c.

³ *Narendra v. Ram Govind*, (1901) 4 Bom. L. R. 243, 29 Cal. 111, 29 I. A. 17; *Karapaya Servai v. Mayandi*, (1933) 12 Ran. 243, 36 Bom. L. R. 394, p. c.

⁴ *Narendra v. Ram Govind*, supra; *Karapaya Servai v. Mayandi*, supra; *Bhima v. Dulappa*, (1904) 7 Bom. L. R. 95; *Bhagwan Baksh Singh v. Mahesh Baksh Singh*, (1935) 38 Bom. L. R. 1, p. c.

⁵ *Bhagwan Baksh Singh v. Mahesh Baksh Singh*, sup.

⁶ *Tirlok Nath Shukul v. Musammat Lachmin Kumbhari*, (1903) 30 I. A. 152, 5 Bom. L. R. 474, 25 All. 403.

⁷ *Nga Tun E v. Mi Chon*, (1914) 2 U. B. R. 23; *Jagannatha Mudali v. Chinnaswami Chetti*, (1931) 55 Mad. 243.

⁸ *Rozario v. Ingles*, (1893) 18 Bom. 468. See *Bai Kamla v. Babubhai*, (1925) 28 Bom. L. R. 607.

⁹ *Mayandi Asari v. Sami Asari*, (1931) 55 Mad. 292.

¹⁰ *Sweeney v. Sweeney*, (1935) 62 Cal. 1080.

a mistress and it may be open for the mistress to prove that the real father of the child born during the period of her concubinage is different from her paramour.¹

Muhammadian law.—According to Muhammadian law a child born six months after marriage or within two years after divorce or the death of the husband is presumed to be his legitimate offspring. If the question for decision be one of evidence only it will be governed by this section,² and the child will be considered legitimate.³ A child born more than two hundred and eighty days after the dissolution of his mother's marriage with her first husband but less than six months after her marriage with her second husband was held entitled to inherit as the legitimate son of the second husband.⁴

CASES.—Where a wife came to her husband's house a few days before he died and remained there up to the time of his death and it was shown that a child, alleged to be that of her husband, was the child of the wife, and that it was born within the time necessary to give rise to the presumption under this section, it was held, in the absence of any evidence to show that the husband could not have had connection with his wife during the time she was residing with him, that the presumption as to the paternity of the child given by this section must prevail. The fact that the husband was, during the period within which the child must have been begotten, suffering from a serious illness which terminated fatally shortly afterwards was held, under the circumstances, not sufficient to rebut the presumption.⁵

A woman married a man in September, 1903; the marriage was dissolved in May, 1904; she married another in June, 1904; a son was born to her in September, 1904, during the continuance of her marriage with her second husband. It appeared that the latter had access to her during her first marriage. In a suit by the son to recover the property of the second husband on his death, it was contended that the plaintiff was not the legitimate son of the second husband. It was held that the plaintiff was in law the legitimate son of the second husband of the woman, and was entitled to his properties.⁶

The question for decision was the paternity of the defendant. He was born of one H on October 17, 1919, i.e., two hundred and seventy-nine days after January 10, 1919, the date of the death of her first husband. She had entered into a second marriage on February 25, 1919, with another man and defendant was born during the continuance of that marriage. It was held that as this section referred to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child, the presumption was that the second husband was the father of the defendant.⁷

¹ *Mania v. Deorao*, [1942] Nag. 388.

² *Mazhar Ali v. Budh Singh*, (1884) 7 All. 297, F.B.; *Musammam Kaniza v. Hasan Ahmad Khan*, (1925) 1 Luck. 71.

³ *Sibt Muhammad v. Muhammad Hameed*, (1926) 48 All. 625; *Muhammad Allahdad Khan v. Muhammad Ismail Khan*, (1888) 10 All. 289.

⁴ *Nur-ul-Hasan v. Muhammad Ha-*

san, (1910) P. R. No. 78 of 1910 (Civil); *P v. P*, (1911) P. R. No. 77 of 1911 (Civil).

⁵ *Narendra Nath Pahari v. Ram Gobind Pahari*, (1901) 29 Cal. 111, 4 Bom. L. R. 243, 29 I. A. 17.

⁶ *Palani v. Sethu*, (1924) 47 Mad. 706, on appeal, *Sethu v. Palani*, (1925) 49 Mad. 553; *Pal Singh v. Jagir*, (1926) 7 Lah. 368.

⁷ *Fai Singh v. Jagir*, *ibid*.

113. A notification in the Official Gazette that any portion of British territory has before the commencement of Part III of the Government of India Act, 1935, been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

COMMENT.—Object.—This section was enacted to exclude inquiry by Courts of Justice into the validity of the acts of the Government so far as cession of territory to any Indian State was concerned. But the section is a dead-letter because it is declared to be *ultra vires* by the Privy Council in a case in which it is decided that the Governor-General-in-Council being precluded by 24 & 25 Vic. c. 67, s. 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not, by any legislative Act, purporting to make a notification in the Government Gazette conclusive evidence of a cession of territory, exclude inquiry as to the nature and lawfulness of that cession.¹

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events,¹ human conduct² and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS.

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ;

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars ;

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration ;

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence ;

✓ (e) that judicial and official acts have been regularly performed ;

(f) that the common course of business has been followed in particular cases ;

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it ;

(h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ;

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it :—

as to *illustration (a)*—a shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

¹ *Damodhar Gordhan v. Deoram Kanji*, (1875-1876) 3 I. A. 102, 1 Bom. 307.

as to *illustration (b)*—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself :

as to *illustration (b)*—a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

as to *illustration (c)*—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

as to *illustration (d)*—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

as to *illustration (e)*—a judicial act, the regularity of which is in question, was performed under exceptional circumstances :

as to *illustration (f)*—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

as to *illustration (g)*—a man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

as to *illustration (h)*—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

as to *illustration (i)*—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

COMMENT.—Sections 104 to 113 direct on whom burden of proof will lie. The Court is bound in every instance to presume against the party on whom the burden of proof is directed to lie. No option is given to the Court as to whether it will presume the fact or not. But there are various presumptions where room is left for the Court to exercise its powers of inference. The Court can throw the burden of proof on whichever side it chooses. This section deals with cases of that description. It declares that the Court may, in all cases whatever, draw from the facts before it, whatever inferences it thinks just. The terms of the section are such as to reduce to their proper position of mere maxims, which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustrations.¹

The effect of this provision is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no particular rules whatever on the subject. The illustrations given are, for the most part, cases of what in English law are called presumptions of law : artificial rules as to the effect of evidence by which the Court is bound to guide its decision, subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the section (114) in question.²

¹ Stephen's Introduction to Evidence Act.

² Gazette of India, March 30, 1872, Supplement, pp. 234-235.

Scope.—This section authorises the Court to make certain presumptions of fact. They are all presumptions which may naturally arise, but the Legislature, by the use of the word 'may' instead of 'shall' both in the body of the section and in the illustrations, shows that the Court is not compelled to raise them but is to consider whether in all the circumstances of the particular case they should be raised.¹

Presumptions.—Presumptions may be either of law or fact, and when of law may be either conclusive (*præsumptiones juris et de jure*), or *rebuttable* (*præsumptiones juris*), but when of fact (*præsumptiones hominis*) are always rebuttable. Mixed presumptions are those which are partly of law and partly of fact.²

Presumptions of law differ from presumptions of fact in the following respects:—(1) Presumptions of law derive their force from *law*; while presumptions of fact derive their force from *logic*. And though many of the former have intrinsic logical weight, being indeed derived from the latter, yet there are others which have none. (2) A presumption of law applies to a *class*, the conditions of which are fixed and uniform; a presumption of fact applies to *individual cases*, the conditions of which are inconstant and fluctuating. (3) Presumptions of law are drawn by the *Court*, and in the absence of opposing evidence are conclusive for the party in whose favour they operate; presumptions of fact are drawn by the *jury*, who may disregard them however cogent.³

As to statutory presumptions, see ss. 118, 119-122, 137 of the Negotiable Instruments Act; ss. 53 and 101 of the Transfer of Property Act; s. 6 of the Land Acquisition Act (I of 1894). There are various other statutory presumptions.

The chief function of rebuttable presumptions of law is to determine on whom the burden of proof rests.

1. 'Common course of natural events'.—This expression is appropriate in regard to such matters as the period of gestation or the continuance of life. The legitimacy of a child may have to be decided by reference to the term during which in the ordinary course of nature gestation may continue.

In divorce cases it is not necessary to prove the direct fact of adultery; nor is it necessary to prove the existence of guilty affection in every case. Adultery may legitimately be inferred from evidence of opportunity, where the circumstances are such as would lead a reasonable and just person to the conclusion that adultery had been committed. This section authorises such inference or presumption.⁴

Under this section the Court is entitled, if it appears reasonable in all the circumstances of the case, to draw an inference that the accused committed a murder or took part in its commission, from the facts that he has been found in possession of the property proved to have been in the possession of the murdered person at the time of the murder or is able to point out the place where such property is concealed and admits having concealed it there and that he fails to give any explanation of his possession of the property, which can be accepted. The possession of stolen ornaments belonging to the murdered soon after the murder is, therefore, material evidence against the accused not only on the charge of robbery but also on the charge of murder.⁵

¹ *Muthukumaraswami Pillai v. King-Emperor*, (1912) 35 Mad. 397, F.B.

² Phipson, 7th Edn., p. 650.

³ *Ibid.*, p. 651.

⁴ *Cyril Gibbs v. Ellen Gibbs*, (1933) 55 All. 597.

⁵ *Ramprasad v. King-Emperor*, [1949] Nag. 200.

2. 'Human conduct'.—As an example of an inference to be drawn from the conduct of a person the following is apposite. It is settled law that where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him. If such servant fail to return the property or to account or gives an account which is shown to be false and incredible, it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use. In such cases the Court is entitled to draw hostile inferences and presumptions from the action and statements of the servant.¹

Where there is a long and continuous course of co-habitation between a man and a woman, the law presumes in favour of marriage against concubinage under this section even in the absence of a satisfactory direct evidence of marriage. Such presumption of marriage can only be repelled by evidence of the clearest character.²

Illustrations.—The illustrations given under this section are not exhaustive. They are merely a few examples of this class of "natural" presumptions, and they do not exclude the other numerous cases in which such presumptions are constantly drawn. The Court need not draw the presumption in any particular case. The word used is "may"; and wherever the informative facts proved overbalance the probability that the inference would be a sound and just one, the Court will exercise its sound discretion in electing not to rest upon the presumption.³ The illustrations are merely examples of circumstances in which certain presumptions may be good and other presumptions, of a similar kind in similar circumstances, may be made under the provisions of the section itself. Every one of the illustrations is followed by an exception.⁴ There are several presumptions recognised in Hindu law, Muhammadan law, criminal law, etc., e.g., the original status of a Hindu family must be presumed to be joint and undivided; in a joint Hindu family the whole property of the family is joint estate; in the absence of express contract a Muhammadan dowry is presumed to be prompt; every person above the age of fourteen is presumed to be acquainted with the law of the land; the accused is presumed to be innocent.

Illustration (a).—This illustration raises two presumptions, viz., that the person in possession of stolen goods soon after the theft (1) is either the thief, or (2) has received the goods knowing them to be stolen. The question as to which of the two presumptions is to be drawn will depend upon the facts of each particular case. This is a presumption which the Court is not bound to draw but it is in the option of the Court to draw it. But it does not, in any way, shift the burden of proof to the accused. The words "can account for its possession" do not mean that the accused must prove it positively that he received the property in the manner indicated by him. If the explanation given is not inherently improbable or palpably false and the Court or the jury trying the case find it to be reasonably true, the adverse presumption shall be deemed to have been rebutted. The meaning of the words "reasonably true" appears to be that the explanation must be sufficient to cast a doubt on the guilt of the accused and in that case unless the prosecution proves beyond reasonable doubt that the accused received the property knowing it to be stolen, the benefit of the doubt shall go to him.⁵

¹ *Sona Meah v. King-Emperor, Rahaman*, [1942] 2 Cal. 299.
 (1924) 2 Ran. 476, 477. See *Emperor*

³ Norton, 299.

⁴ *Abdul Gani*, (1925) 27 Bom. L. R. 1873.

⁵ *Emperor v. Chhidda*, [1944] All. 694.

⁵ *Emperor v. Jagannath*, [1945] All.

² *Chandu Lal Agarwala v. Khalilar* 11.

The mere fact of recent possession of stolen property is in general evidence of theft, not of receipt of stolen property with guilty knowledge.¹ It would be a reasonable presumption that people had committed theft or burglary if they were seen the next day with the stolen property in circumstances which suggested that they were dividing up the booty. Such an inference would not be an inference of law; it would be a pure inference of fact. It would be open to the accused to explain that they were there for some innocent purpose, but in the absence of such explanation the presumption will be that they had taken part in the offence.² The presumption contemplated in this illustration is not a presumption as to the fact of possession, but the presumption of guilt which arises from the accused not accounting for his possession of stolen goods of which he is proved to be in possession soon after the theft. This presumption of guilt cannot, therefore, arise before such actual possession is proved, or before the accused, on opportunity being given, fails to account for his possession.³ But the possession of stolen property, even if accompanied by a failure to give an account as to how such possession was acquired, or by a false account, or by accounts which are contradictory, or by a concealment of the property, would raise not a violent or strong presumption, but a probable presumption merely.⁴

This illustration does not mean that the burden of proof is shifted on to the accused, so that he must prove affirmatively that he came by the goods innocently. It is sufficient if he can give an explanation which may raise doubt in the mind of the Court as to the guilt of the accused, —which in the opinion of the Court may possibly be true. So, where a conviction under s. 411 of the Indian Penal Code was based on the presumption aforesaid, the Court saying that the burden of proving his bona fides was thrown on the accused and that the oral testimony on behalf of the accused to prove that he had purchased the goods from a certain person was not very reliable, it was held that the conviction was legal.⁵

Under this illustration the Court may, but is not obliged to, make the presumption therein mentioned. Even if the Court make the presumption, the onus on the general issue is still on the prosecution. It is not the law that if the accused fails to account for his possession of the goods said to be stolen he must be convicted, if the other proved facts of the case do not predicate guilt. The accused is not required to prove his explanation by adducing substantive evidence. In many cases it may be impossible for him to do so, particularly if he alone knows the facts, for he cannot give evidence on oath on his own behalf.⁶

The mere fact that an accused person points out the place in which the stolen property is concealed does not give rise to any presumption under this section or justify his conviction for the offence of receiving stolen property, still less for the offence of theft.⁷ But where property forming part of the stolen property is produced by a person from his house, a presumption under it can be drawn against

¹ *Nga Kywet v. Queen-Empress*, (1900) 1 L. B. R. 39; *Nga Don Be v. The Crown*, (1902) 1 L. B. R. 332; *Karpini v. Queen-Empress*, (1896) P. J. L. B. 276; *Mi Myit v. Queen-Empress*, (1897) 1 U. B. R. (1897-1901) 171.

² *Emperor v. Chhidda*, [1944] All. 694.

³ *Emperor v. Hari*, (1904) 6 Bom. L. R. 887, 893. See *Satya Charan Manna v. Emperor*, (1924) 52 Cal. 223; *The Crown v. Saifal*, (1936) 18 Lah.

227; *Nand Lal v. King-Emperor*, (1941) 17 Luck. 182.

⁴ *Ina Sheikh v. Queen-Empress*, (1885) 11 Cal. 160, 163.

⁵ *Emperor v. Hori Lal*, (1933) 56 All. 250.

⁶ *Keshab Deo Bhagat v. Emperor*, [1944] 1 Cal. 595.

⁷ *Emperor v. Yeshaba Sakhoba*, (1938) 40 Bom. L. R. 927.

him.¹ When an accused makes a statement that, "I have concealed the property at a particular place and I will produce it," and if it is discovered in consequence of that statement, it is evidence of his possession, even though the stolen articles are kept or concealed in another man's property, because unless he had possession he would not have kept them at that place. Where, however, an accused without stating that he has concealed stolen property, merely produces it from a place to which other people can have access, it is not sufficient to establish his possession even though the property may be concealed, because it is consistent with any other person having done so and the accused may have merely knowledge of it.²

Possession must be recent possession. The question what period is covered by the expression "soon after" depends upon the circumstances of each case. The Court is not bound to draw this presumption, and it must always ask itself whether in the circumstances of the particular case the presumption is one which in fairness to the accused can be drawn.³ Lapse of time rebuts the presumption. Where stolen articles of a very common description, consisting of jewellery of a very ordinary type and by no means of distinctive appearance, were found in the possession of a person six months after the commission of a dacoity, such possession was not deemed sufficient to call upon the accused to explain his possession.⁴ Where an old brass bell stolen was found in the possession of an old iron dealer thirteen days after the theft, the presumption under this section was not drawn.⁵ It was held similarly where a stolen buffalo was found in the possession of a person four or five months after the theft.⁶

"But to raise this presumption legitimately, the possession of the stolen property should be *exclusive* as well as recent. If, for instance, the articles stolen were found on the person of the accused, or in a locked-up house or room, or in a box of which he kept the key, there would be fair ground for calling on him for his defence; but if they were found lying in a house or room in which he lived jointly with others equally capable with himself of the theft, or in an open box to which others had access, this would raise no definite presumption of his guilt".⁷

The presumption in this illustration is not confined to charges of theft, but extends to all charges, however penal, not excluding even murder. Therefore where a person charged with dacoity is shown to have been in possession of part of the stolen property soon after the dacoity, it may be presumed that he was one of the dacoity or that he received the property knowing it to have been stolen at the dacoity.⁸ The principle of ill. (a) applies not only to cases of ordinary theft but also to cognate offences such as dacoity and robbery.⁹

Illustration (b).—An accomplice is one who is a guilty associate in crime. Where the witness sustains such a relation to the criminal act that he could be jointly indicted with the accused, he is an accomplice.¹⁰ It is a rule of prudence and practice which practically amounts to a rule of law that the evidence of an accomplice ought not to be acted upon unless it is corroborated as against the

¹ *Emperor v. Shivputraya*, (1930) 43 Bom. L. R. 629.
32 Bom. L. R. 574.

² *Emperor v. Chavadappa Pujari*, (1944) 47 Bom. L. R. 63.

³ *Emperor v. Mavji Nanji*, (1941) 43 Bom. L. R. 629.

⁴ *Emperor v. Sughar Singh*, (1906) 29 All. 138; *Nga Yauk v. Queen-Empress*, (1885) S. J. L. B. 366.

⁵ *Emperor v. Mavji Nanji*, (1941)

⁶ *Hashim v. Crown*, [1942] Kar. 186.

⁷ Best, 12th Edn., s. 212, p. 197.

⁸ *Ramsarup Singh v. King-Emperor*, (1929) 9 Pat. 606; *Queen-Empress v. Sami*, (1890) 13 Mad. 426.

⁹ *Dhyaniogope v. King-Emperor*, (1946) 25 Pat. 262.

¹⁰ *Ramaswami Gounden v. Emperor*, (1903) 27 Mad. 271, 277.

particular accused in material respects.¹ Where the accomplice is not really a criminal but a spy or informer his evidence does not require any corroboration.² Corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.³ The confession of a co-accused cannot be used to corroborate the evidence of an accomplice.⁴ The evidence of an accomplice ought to be regarded with suspicion. The degree of suspicion which will attach to it must vary according to the extent and nature of the complicity.⁵

The corroboration in the case of an accomplice must point to the identification of the person charged with the particular act with which the direct evidence connects him.⁶ The corroboration in material particulars must be such as to connect or identify each of the accused with the offence.⁷

The rule in this illustration is to be read along with s. 133, and neither rule is to be ignored in the exercise of judicial discretion. In point of law an accomplice is a competent witness against an accused person (*vide* s. 133). But great caution in weighing his testimony is dictated by prudence and reason. Unless the case is a very exceptional one, an accomplice's evidence should not be accepted as being sufficient.⁸ In England it is regarded as the settled course of practice not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice.⁹ The corroboration which the common law requires is corroboration in some material particular tending to show that the accused committed the crime charged. It is not enough that the corroboration shows the witness to have told the truth in matters unconnected with the guilt of the accused.¹⁰ See comment on s. 133, *infra*.

One accomplice cannot corroborate another. At the same time, this section with its illustrations makes it clear that the agreement of the testimony of several accomplices in circumstances precluding the possibility of previous consultation with each other is one of the circumstances which may sometimes justify the Court in acting upon the evidence of accomplices alone.¹¹

The evidence of an accessory after the event suffers more or less from the same taint as the evidence given by the accomplice. It would be very unsafe to accept the solitary evidence of such a person as proving the guilt of an accused without independent corroboration in material particulars.¹²

Illustration (c).—The presumption on which this illustration is founded is in accordance with the maxim *omnia præsumentur rite esse acta*, i.e., all things are presumed to be done in due form. The principle of the maxim "has, in many instances, been recognised in support of the solemn acts of even private persons,

¹ *Emperor v. Mataprasad Shivharak*, (1942) 45 Bom. L. R. 64.

² *Queen-Empress v. Bastin*, (1897) P. J. L. B. 365, *contra*, *Me The U v. Queen-Empress*, (1881) S. J. L. B. 146.

³ *Noor Ahmad v. Emperor*, (1933) 62 Cal. 527.

⁴ *Provincial Government, Central Provinces and Berar v. Raghuram*, [1942] Nag. 749.

⁵ *Srinivas Mall Bairoliya v. Emperor*, (1947) 49 Bom. L. R. 688, P.C.

⁶ *Emperor v. Katwa*, (1926) 48

All. 409.

⁷ *Rebati Mohan Chakravarty v. Emperor*, (1928) 56 Cal. 150.

⁸ *Rajagopal*, [1944] Mad. 308, F.B.

⁹ *Reg. v. Gallagher*, (1875) 13 Cox 61.

¹⁰ *Rea v. Baskerville*, [1916] 2 K.B. 658.

¹¹ *Nawal Kishore Rai v. King-Emperor*, (1942) 22 Pat. 27.

¹² *King-Emperor v. Kalloo*, (1936) 13 Luck. 115; *Baboo Singh v. King-Emperor*, (1935) 11 Luck. 662.

.... Thus, if an act can only be lawful after the performance of some prior act, due performance of that prior act will be presumed. Again, although in the case of contracts not under seal, a consideration must in general be averred and proved, yet bills of exchange and promissory notes enjoy the privilege of being presumed, *prima facie*, to be founded on a valuable consideration. The law raises this presumption in favour of these instruments, partly because it is important to preserve their negotiability intact, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves, and the deliberate mode in which they are executed."¹

The explanation to this illustration speaks of "a man of business," which in its well-known popular sense must mean a man habitually engaged in mercantile transactions or trade.²

Sections 118 and 119 of the Negotiable Instruments Act lay down certain other presumptions. The Lahore High Court has held that s. 118 of the Negotiable Instruments Act replaces the explanation attached to this illustration and therefore the rule laid down in this illustration is modified by s. 118. What was permissible in the Evidence Act was converted into a statutory obligation in the Negotiable Instruments Act. While illustration (c) is confined to the acceptance or endorsement of a bill of exchange, s. 118 of the Negotiable Instruments Act applies to the making or drawing of it also.³ The Madras High Court has held that the difference between this section and s. 118 of the Negotiable Instruments Act consists only in this, that, under the first, the Court has a discretion to make the presumption or not, whereas, under the second, the Court is bound to start with the presumption; but once the presumption is made, there is no difference between the two cases, in the manner of displacing the presumption or disproving the "presumed" fact. Any presumption as to *quantum* of consideration, as distinguished from the mere existence of consideration, has accordingly to be drawn, not by virtue of s. 118 of the Negotiable Instruments Act or even under this section, but only from the recitals, if any, that the instrument may contain. As to such recitals, it has long been established that being *prima facie* evidence against the parties to the instrument, they may operate to shift on to the party pleading the contrary the burden of rebutting the inference raised by them. But the *weight* due to recitals may vary according to circumstances and, in particular circumstances, the burden of rebutting them may become very light, especially when the Court is not satisfied that the transaction was honest and *bona fide*.⁴ The "special rules of evidence" laid down in s. 118 of the Negotiable Instruments Act must have been intended to apply only as between the parties to the instrument or those claiming under them. In other cases the presumption can only be in the terms enacted in this section which by the use of the expression "may presume" leaves it to the Court to apply the presumption or not according to circumstances.⁵

Illustration (d).—This illustration is founded on the presumption which exists in favour of continuance or immutability.

"It is a very general presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence, either direct or circumstantial. Thus, where

¹ Taylor, 12th Edn., s. 148, p. 139.

⁴ *Narasamma v. Veeraju*, (1934)

² *Ningawa v. Bharmappa*, (1897) 23 Bom. 63, 66.

58 Mad. 841, 850.

³ *Bannu Mal v. Munshi Ram*, (1935) 17 Lah. 107, 113.

⁵ *Narayana Rao v. Venkatappayya*, [1937] Mad. 299, 304.

seisin of an estate has been shown, its continuance will be presumed; as also will that of the authority of an agent."¹

The ordinary legal presumption is that things remain in their original state.² If a person is shewn at one time to be a member of a joint Hindu family, it will be held under this illustration that he never separated at all unless the contrary is proved.

Sections 107-109 deal with particular applications of the principle of which this illustration is the general expression.

Illustration (e).—The rule embodied in this illustration flows from the maxim *omnia præsumentur rite et solemniter esse acta*, i.e., all acts are presumed to have been rightly and regularly done. "The true principle intended to be conveyed by the rule, '*omnia præsumentur rite et solemniter esse acta*,'... seems to be, that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy."³ If an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential for a plaintiff's case.⁴ The Court can make a presumption that official acts have been regularly performed. Whether a presumption should or should not be made must depend upon the particular circumstances of each case.⁵

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption can be made in favour of the things prescribed by the Act having been done. If, for example, publication of a notice was essential under an Act in order to bind a person, such publication must be distinctly proved.⁶ But the Privy Council has held that in the absence of evidence to the contrary it has to be presumed that the procedure laid down in a statute was duly followed and that proper statutory notice was given.⁷ Where a warrant contains a preamble that the requirement of a section of an Act has been fulfilled, a presumption arises under this illustration that the officer issuing the warrant has performed his duty correctly.⁸ The Calcutta High Court has held that the Privy Council has virtually overruled the decisions which laid down that it is not sufficient for the purpose of proving service of notice to rely on the presumption arising out of this section.⁹

¹ Best, 12th Edn., s. 405, p. 345.

² *Mussamat Jarut-ool-Butool v. Mussamat Hoseinee Begum*, (1867) 11 M. I. A. 194, 209.

³ Best, 12th Edn., s. 353, p. 312.

⁴ Per Woodroffe, J., in *Narendra Lal Khan v. Jogi Hari*, (1905) 32 Cal. 1107, 1121; *Emperor v. Leslie Gwill*, (1944) 47 Bom. L. R. 431.

⁵ *Harkishandas v. The Crown*, (1943) 25 Lah. 245, F.B.

⁶ *Ashanullah Khan Bahadur v. Trilochan Bagchi*, (1886) 13 Cal. 197; *Wakelar v. Emperor*, (1926) 53 Cal. 718.

⁷ *Jitendra Nath Ghose v. Monmohan Ghose*, (1930) 57 I. A. 214, 58 Cal. 301.

⁸ *Emperor v. Savlaram Kashinath*, (1947) 40 Bom. L. R. 798.

⁹ *Sasi Sekhar Sen Biswas v. Maharaja Bir Bikram Kishore Manikya*, (1931) 35 C. W. N. 1239.

A presumption arises under this section as to legality and correctness of a Court's proceedings.¹

Entries in Collector's books are presumed to be correct having regard to ills. (e) and (f).²

See ss. 79-86 as to the presumptions of this kind in respect of documents.

Illustration (f).—This illustration leaves it to the discretion of the Court to presume that a common course of business has been followed: but the Court is not bound to presume it.³ In commercial transactions the presumption is that the usual course of business was followed by the parties thereto.

"Many presumptions are drawn from the usual course of business in public offices. With regard to the course of the post,....if a letter is put into a post office, that is *prima facie* proof, until the contrary appears, that the party to whom it is addressed received it in due course."⁴ "Postmarks on letters are *prima facie* evidence that the letters were in the post at the time and place therein specified.... if a letter, properly directed, is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed."⁵ Where the facts of a particular case can form a foundation for a fair presumption that an application was made the Court is entitled to presume that it was made.⁶

The effect to be given to the word "refused" on a registered cover as proof of tender of the packet to the addressee is one of fact and will depend upon the circumstances of each case.⁷

See ss. 16 and 32 (2).

Illustration (g).—This illustration deals with the presumption arising from withholding evidence. The conduct of the person withholding the evidence may be attributed to a supposed consciousness that the evidence, if produced, would operate against him.

In order to entitle the Court to draw inferences unfavourable to the person withholding evidence, the opposite party must satisfy the Court that such evidence was in existence and could be produced.⁸

When material witnesses are not called in a case and no sufficient explanation has been given for their absence, the Court or a jury may draw a presumption that they would not support the prosecution.⁹ The non-production of account books by a party when such account books would throw light on some of the issues in the case would raise the presumption that if the books had been produced the result would have been unfavourable to the party not producing them.¹⁰

¹ *Munshi Raghubir Singh v. Rani Rajeshwari Devi*, (1933) 9 Luck. 90; *Sheikh Ala Bakhsh v. Thakur Durga Bakhsh Singh*, (1933) 9 Luck. 162.

² *Mahomed Solaiman v. Birendra Chandra Singh*, (1922) 50 Cal. 243, 50 I. A. 247; *Emperor v. Shib Charan*, [1938] All. 386.

³ *Ram Das Chakarvati v. The Official Liquidator, Cotton Ginning Company, Ltd., Cawnpore*, (1887) 9 All. 366, 376.

⁴ Best, 12th Edn., s. 403, p. 344.

⁵ Taylor, 12th Edn., s. 179, p. 163.

⁶ *Mulchand v. Jamanbi*, (1925) 27 Bom. L. R. 671; *Trimbak v. Kashinath*, (1897) 22 Bom. 722.

⁷ *Gopal v. Krishna*, (1901) 3 Bom. L. R. 420.

⁸ *Mahabir Singh v. Rohini Ramnadrwaaj Prasad Singh*, (1933) 35 Bom. L. R. 500, p.c.

⁹ *Bhubanbijay Singh v. Emperor*, (1933) 60 Cal. 1361.

¹⁰ *Gujarat Ginning & Co., Company v. Motilal Hirabhai Spinning & Co., Company* (No. 1), (1928) 31 Bom. L. R. 1310, 1316, 53 Bom. 792.

The presumption laid down in this illustration was held to apply to the case of counsel engaged in a suit who should not have been, under the circumstances, counsel but should have been called as a witness.¹

Illustration (h).—Refusal to answer a question is a legitimate ground of unfavourable inference against the person who may answer the question. See s. 148(4), *infra*. But this illustration does not contemplate the case of witnesses who are not compelled to answer on grounds of privilege (*vide* ss. 121-123).

See s. 342, Criminal Procedure Code (Act V of 1898).

Illustration (i).—This presumption is founded on the natural supposition that a man will protect his own interests by securing his bond before or at the time of discharging it. Where the instrument of a debt and the security for that debt are found in the hands of the debtor, the *prima facie* presumption is that the debt has been discharged.² If a pro-note is in the hands of the maker, there is a presumption that it has been paid off. If the drawee alleges that the maker came into possession of the note unlawfully, the onus is on him to prove it. This illustration only refers to presumption that may be raised. It does not follow that such presumption would shift the onus of proof.

In a suit on a bond for money, plaintiff alleged that his non-production of the document was due to the fact that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it; it was held that the burden of proof was on the defendant to prove payment, either by the production of the bond, or other evidence or by both.³

Where plaintiff sued for money due upon *hundis* (bills of exchange), but alleged their loss, whilst defendant admitted execution, but pleaded payment and subsequent destruction of the documents, it was held that failing production of the *hundis* by the defendant there was no presumption that the *hundis* had been discharged and the onus was upon the defendant to prove payment.⁴

In a suit for money due on a mortgage bond, the plaintiff produced only a copy of the document, alleging in his plaint that it had been lost. The defendant admitted its execution, but alleged that the debt had been discharged, and in support of his allegation he produced the original document containing the endorsement of the mortgagee through her agent of payment of the debt. It was held that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still outstanding.⁵

CHAPTER VIII.

ESTOPPEL.

115. When one person has, by his declaration, act or omission,¹ intentionally caused or permitted another person to believe a thing to be true and to act upon such belief,² neither he nor his representative shall be allowed, in any suit or

Estoppel.

¹ *Weston v. Peary Mohan Dass*, (1918) 10 L. B. R. 26.
(1912) 40 Cal. 898.

² *Bhoy Hong Kong v. Ramanathan Chetty*, (1902) 29 I. A. 43, 29 Cal. 334,
4 Bom. L. R. 378.

³ *Chuni Kuar v. Udai Ram*, (1883)
6 All. 73; *Aung Myat v. Hla May*,

⁴ *Dhian Singh v. Gurdit Singh*,
(1925) 6 Lah. 297.

⁵ *Mohammad Mehdi Hasan Khan v. Mandir Das*, (1912) 39 I. A. 184, 34
All. 511, 14 Bom. L. R. 1073.

proceeding between himself and such person or his representative, to deny the truth of that thing.

ILLUSTRATION.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

COMMENT.—Principle.—Estoppel is based on the principle that it would be most inequitable and unjust that if one person, by a representation made, or by conduct amounting to a representation, has induced another to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.¹

The section says that when one person has by his

(a) declaration, (b) act, or (c) omission,
intentionally caused or permitted another person

(i) to believe a thing to be true, and (ii) to act upon such belief,
neither he nor his representative shall be allowed to deny the truth of that thing in any suit or proceeding between himself and such person or his representative.

This section is founded upon the doctrine laid down in *Pickard v. Sears*,² namely, that where a person "by his words or conduct wilfully causes another to believe that existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The doctrine embodied in this section is not a rule of equity, but is a rule of evidence formulated and applied in Courts of law.³ It precludes a person from denying the truth of some statement previously made by himself. No cause of action arises upon estoppel itself.

Estoppel is based on the maxim, *allegans contraria non est audiendus* (a person alleging contradictory facts should not be heard), and is that species of *præsumptio juris et de jure*, where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done; it is in truth a kind of *argumentum ad hominem*. Hence it appears that 'estoppels' must not be understood as synonymous with "conclusive evidence",—the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal, or rendered conclusive on a party, either by common or statute law.⁴

The doctrine of estoppel has, however, been guarded with great strictness; not because the party enforcing it is presumed to be desirous of excluding the truth...but because the estoppel may exclude the truth. Hence estoppels must be certain to every intent; for no one shall be prevented from setting up the truth, unless it be in plain contradiction to his former allegations and acts. These last words extend, not only to a man's own allegations and acts, but also to those of

¹ *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892) 19 I. A. 203, 215, 216, 20 Cal. 296; *Pickard v. Sears*, (1837) 6 Ad. & El. 469.

² (1837) 6 Ad. & El. 469, 474.

³ *Municipal Corporation of Bombay v. Secretary of State*, (1904) 29 Bom. 580, 7 Bom. L. R. 27.

⁴ Best, 12th Edn., s. 533, p. 463.

all persons through whom he claims; or, to express the same sentiment in the technical language of the law, *estoppels* are usually *binding upon parties and privies*. Lord Coke has divided privies into three classes: first, privies in blood, as heirs; secondly, privies by estate, as feoffees, lessees, assignees, etc.; and thirdly, privies in law "as the lord by escheat, the tenant by the courtesy, the tenant in dower, the incumbent of a benefice," husbands suing or defending in right of their wives, executors and administrators. In all these and the like cases, the law—acting upon the wise principle *qui sentit commodum, sentire debet et onus*—provides, that the privy shall stand in no better position than the party through whom he derives his title; but that, if the latter is not at liberty to contradict what he has formerly said or done the former shall be subject to a like disability.¹

Estoppel depends on the existence of some duty; and that is peculiarly so in the case of an omission. In order to succeed on a plea of estoppel it must be shown that there was a neglect of some duty owing to the person led into a particular belief, or to the general public of whom that person is one, and not merely neglect of what would be prudent in respect to the party prejudiced, or even of some duty owing to third persons, with whom those seeking to set up estoppel are not privy. There is a breach of the duty if the party estopped has not used due precautions to avert the risk.²

Estoppel applies not only in favour of the person induced to change his position but of a transferee from such persons, and it binds not only the persons whose representations or actings have created it, but all persons claiming under or through him by gratuitous title.³

Estoppel is a rule of civil actions. It has no application to criminal proceedings, though in such proceedings it would be prejudicial to set up a different story.

Estoppel and presumption.—Estoppel differs from presumption. An estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts; whereas a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them.⁴

Estoppel and *res judicata*.—Estoppel differs from *res judicata*: (1) Estoppel is part of the law of evidence and proceeds upon the equitable principle of altered situation; the doctrine of *res judicata* belongs to procedure and is based on the principle that there must be an end to litigation.

(2) Estoppel prohibits a party from proving anything which contradicts his previous declarations or acts, to the prejudice of a party, who, relying upon them, altered his position; *res judicata* prohibits the Court from enquiring into a matter already adjudicated.

(3) Estoppel shuts the mouth of a party; *res judicata* ousts the jurisdiction of the Court.⁵

Put in the most simple and colloquial way, *res judicata* precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another.⁶

¹ Taylor, 12th Edn., ss. 89-90, pp. 86-87.

851, 45 I. A. 97, 45 Cal. 909.

⁴ Stephen, 175.

² *Mercantile Bank of India, Limited v. Central Bank of India, Ltd.*, (1937) 40 Bom. L. R. 713, 65 I. A. 75, (1938) Mad. 360.

⁵ Woodroffe and Ameer Ali, 9th Edn., p. 850.

³ *Raj Kumar Jagannath Prashad v. Syed Abdullah*, (1918) 20 Bom. L. R.

⁶ *Casamally v. Sir Currimbhai Ebrahim*, (1911) 13 Bom. L. R. 717, 760, 36 Bom. 214.

Estoppel and waiver.—Estoppel and waiver are different. Estoppel is not a cause of action. It may, if established, assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action; or, in other words, by preventing a defendant from asserting the existence of some fact, the existence of which would destroy the cause of action. Waiver, on the other hand, is contractual, and may constitute a cause of action; it is an agreement to release or not to assert a right. If an agent, with authority to make such an agreement, on behalf of his principal, agrees to waive his principal's rights, then, subject to any other question such as consideration, the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver.¹

Kinds of estoppels.—There are different kinds of estoppels : (1) estoppels by matter of record; (2) estoppels by deed; and (3) estoppels *in pais*.

Estoppel by matter of record.—A matter of record is something part of the records of a Court. It is at once the narrative and the proof of its proceedings. Estoppel by record results from the judgment of a competent Court. The law allows a party ample opportunity, by way of appeal and otherwise, of upsetting a wrong decision. And if he takes the opportunity and fails, or does not choose to avail himself of it, he cannot subsequently re-open or dispute that decision.

And not only the parties themselves, but also the heir, executor, administrator; and assign of each of them are bound by the decision, for they are 'privy to the estoppel.'

Estoppel by matter of record is chiefly concerned with the effect of judgments and their admissibility in evidence, and this kind of estoppel is dealt with by ss. 11 to 14, Civil Procedure Code, and ss. 40-44 of the Evidence Act. It is the final decision and not any and every expression of opinion in a judgment which gives rise to an estoppel by record, and the actual decision cannot be carried further than the circumstances warrant.² The general principle which runs through the doctrine of estoppel by record is that a decree is an order of the Court and the judgment debtor must, when it has once been completed, obey it unless and until he can get it set aside in proceedings duly constituted for the purpose.³

The force and effect of a judgment depend first upon the nature of the proceedings in which it was rendered, i.e., upon the question whether it was an action *in rem* or *in personam*; and secondly upon the *forum* in which it was pronounced, i.e., upon the question whether it was a judgment of a domestic or foreign Court. The record of a judgment *in rem* is generally conclusive upon all persons. In other cases, so far as the record purports to declare rights and duties, its material recitals import absolute verity between the parties to it and those who claim under them. The estoppel arising from or fixed by the fact enrolled constitutes the estoppel of a judgment. And to the question whether the judgment necessarily creates an estoppel, the general answer is, yes, if it results in *res judicata* : no, if it does not.⁴

A consent decree will act as an estoppel until it is set aside by a proper suit.⁵

Estoppel by deed.—Where a party has entered into a solemn engagement by deed as to certain facts, neither he nor any one claiming through or under him is

¹ *Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha*, (1935) 37 Bom. L. R. 544, 62 I. A. 100, 13 Ran. 256.

² *Ghasiram v. Kundanbai*, [1941] Nag. 513.

³ *Ramrao v. Dattadajal*, [1947] Nag.

889.

⁴ Bigelow, 6th Edn., pp. 406-410, Woodroffe and Amcer Ali, 4th Edn., p. 850.

⁵ *Basangouda v. Basalingappa*, (1935) 38 Bom. L. R. 593.

permitted to deny such facts. This is subject to certain qualifications : (1) The rule applies only between parties and privies, and only in actions on the deed. (2) No estoppel arises upon recitals or description which are either immaterial or not intended to bind. (3) No estoppel where the deed is tainted by fraud or illegality. (4) A deed which can take effect by interest shall not be construed to take effect by estoppel. Thus if a party leases premises to another for a longer term than he himself possesses, it only enures to the extent of his own interest and no further.¹

The doctrine of English law as to estoppel by deed does not apply to written instruments in India. Deeds and contracts in this country are to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses.² The art of conveyancing in this country is of so simple and informal a character, that estoppel by deed has been expressly discountenanced by Courts. 'Justice and equity' require no more than that a party to an instrument should be precluded from contradicting it to the prejudice of another person, when that other person or person through whom the other person claims has been induced to alter his position by virtue of the instrument; but when the question arises between the parties or the representatives of parties who at the time of the execution of the instrument were aware of its intention and object and who have not been induced to alter their position by its execution, justice in India will be more surely obtained by allowing any party, whether he be plaintiff or defendant, to show the truth.³

Estoppel in pais.—Estoppel *in pais* (i.e. "in the country", or "before the public"), or more fully "estoppel *in pais de hors* the instrument" (i.e., with regard to matters outside a record or deed) as known to the common law was of an entirely different character to the estoppel *in pais* of the present day. "In deed the estoppel *in pais* of the present day has grown up entirely since the time of Coke, and embraces cases never contemplated in that character by him or by the lawyers of even much later times though the old lines are often visible in the newer pathways."

Estoppel *in pais* arises (1) from agreement or contract; and (2) from act or conduct of misrepresentation which has induced a change of position in accordance with the intention of the party against whom the estoppel is alleged. To raise an estoppel by conduct, a person must by word or conduct induce another to believe that a certain state of things exists, and to cause that other to act on that belief in a way he would not have done had he known the facts, so that, if in an action between them the person making a representation were allowed to prove the true facts—to tell the truth—the other person would be prejudiced. If these two conditions are fulfilled, then the person making the representation will not be allowed to deny its truth in any action between him and the person to whom he made it or the persons who claim in the same right. But in any other action he can deny its truth. The ways in which a person may make such a representation are infinite. He may speak or write, act or omit to act, or act negligently.

The following are the recognised propositions of an estoppel *in pais* : (1) If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes

¹ Phipson, 7th Edn., p. 657.

12 Lah. 546.

² *Ram Lal Sett v. Kanai Lal Sett*, (1886) 12 Cal. 663; *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonjereee*, (1856) 6 M. I. A. 393, 411; *Johnston v. Gopal Singh*, (1931)

³ *Param Singh v. Lalji Mal*, (1877) 1 All. 203; *Johnston v. Gopal Singh*, (1931) 12 Lah. 546; *Deena Bandhu Gan v. Makim Sardar*, (1935) 63 Cal. 763.

in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

(2) If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

(3) If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

(4) If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist.¹

Estoppel *in pais* is dealt with in ss. 115 to 117. Sections 116 and 117 are instances of estoppel by contract, viz., that of the tenant, the licensee, the bailee and the acceptor of a bill of exchange. But the distinction between estoppel by contract and estoppel by conduct is not preserved in the Evidence Act. The sections relating to estoppel in the Evidence Act are not exhaustive. Cases of estoppel may arise which are not within the purview of these sections.² As to other instances of estoppel, see s. 234 of the Indian Contract Act; s. 18 of the Specific Relief Act; ss. 41 and 43 of the Transfer of Property Act; ss. 27 and 53 of the Indian Sale of Goods Act, 1930; and s. 28 of the Indian Partnership Act, 1932.

Equitable estoppel.—A man may be estopped, not only from giving particular evidence, but from doing acts, or relying upon any particular arguments or contention which the rules of equity and good conscience prevent his using as against his opponent.³ The modern law of estoppel owes immensely to the doctrine of equity being founded on the incidents of contracts or relations analogous to contracts coupled with the representations of parties by declaration, act, or omission. Estoppels that are not provided by statute law may, in this country, be termed equitable estoppels.⁴

Scope.—In order to hold that a case comes within the scope of this section a Court must find

- (1) That party A believed a thing to be true.
- (2) That in consequence of that belief he acted in a particular manner.
- (3) That that belief, and A's so acting, were brought about by some representation by party B, either declaration, act, or omission, which representation was made intentionally to produce that result.

¹ Per Brett, J., in *Carr v. London and North Western Railway Co.*, (1875) L. R. 10 C. P. 307, 316, 317, 318.

² *Rup Chand Ghosh v. Sarveswar Chandra Chandra*, (1906) 33 Cal. 915. There are decisions which lay down that these sections are exhaustive: see

Asmatunnessa Khatun v. Harendra Lal Biswas, (1908) 35 Cal. 904.

³ *Ganges Manufacturing Co. v. Sourujmull*, (1880) 5 Cal. 669, 678.

⁴ *Rup Chand Ghosh v. Sarveswar Chandra Chandra*, sup.

If these be established, then B is prohibited by law from denying, in a proceeding against A or A's representative, the truth of his representation.

It is not necessary to prove an intention by B to deceive, or any fraudulent intention. He will be none the less estopped if he himself was acting under a mistake or misapprehension.

The law of estoppel cares nothing for the motive or state of knowledge of the party upon whose representation the action took place. What it does care about is the position of the party who was induced to act. That party can only use as an estoppel a statement by which he was actually misled.

The Crown too comes within the range of the equitable principle of estoppel.¹

1. 'When one person has by his declaration, act or omission'.—The term 'person' applies only to a person of full age and competent to enter into contracts. If an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, the infant is not estopped from setting up infancy in an action founded on the contract.² But the Court has discretion in equity to direct the minor to return the benefit he has received by false representation to the person he has deceived.³ The Allahabad High Court has held that upon equitable grounds he may be made liable for any loss which the plaintiff has suffered.⁴ The Privy Council has not decided the point though the Calcutta High Court in its decision had expressly decided it.⁵

Under the English law a minor is not estopped from pleading his minority. An infant by fraudulently representing that he was of full age induced the plaintiffs to lend him a sum of money. In an action by the plaintiffs to recover the money it was held that the cause of action was in substance *ex contractu*, that the plea of infancy was a good answer to the action, and that the defendant was under no equitable liability to the plaintiffs.⁶ "When an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud."⁷ This case has been approved of by the Privy Council.⁸

¹ *Mun. Corp. of Bombay v. Secretary of State*, (1904) 7 Bom. L. R. 27, 29 Bom. 580.

² *Gadigeppa v. Balangowda*, (1931) 33 Bom. L. R. 1313, 55 Bom. 741, F.B.; *Brohmo Dutt v. Dharma Das Ghose*, (1898) 26 Cal. 381; *Manmatha Kumar Shaha v. Exchange Loan Company, Ltd.*, [1937] 1 Cal. 283; *Nakul Chandra v. Sasadhar*, (1941) 45 C. W. N. 907; *Vaikuntarama Pillai v. Authimoolam Chettiar*, (1914) 38 Mad. 1071; *Radhe Shyam v. Behari Lal*, (1918) 40 All. 558; *Radha Kishan v. Bhore Lal*, (1928) 50 All. 862; *Kumar Ganganand Singh v. Maharaja Sir Rameshwar Singh Bahadur*, (1927) 6 Pat. 388; *Khan Gul v. Lakha Singh*, (1928) 9 Lah. 701, F.B. The former Judicial Commissioner's Court at Nagpur had held likewise: *Gulabchand v. Chunnitlal*, (1929) 25

N. L. R. 85.

³ *Khan Gul v. Lakha Singh*, (1928) 9 Lah. 701, F.B.; *Vaikuntarama Pillai v. Authimoolam Chettiar*, (1914) 38 Mad. 1071; *Kumar Ganganand Singh v. Maharaja Sir Rameshwar Singh Bahadur*, (1927) 6 Pat. 388.

⁴ *Jagar Nath Singh v. Lalla Prasad*, (1908) 31 All. 21; *Radha Kishan v. Bhore Lal*, (1928) 50 All. 862.

⁵ *Mohori Bibee v. Dhurmodas Ghose*, (1903) 30 I. A. 114, 122, 30 Cal. 539, 545, 5 Bom. L. R. 421, 424.

⁶ *R. Leslie, Limited v. Sheill*, [1914] 3 K. B. 607.

⁷ *Ibid.*, p. 618.

⁸ *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*, (1916) 43 I. A. 256, 19 Bom. L. R. 157, [1916] 2 A. C. 575, followed in *Mt. Mulibai v. Garud*, (1919) 15 N. L. R. 149.

2. 'Intentionally caused or permitted another person to believe a thing to be true and to act upon such belief'.—A person who, by his declaration, act, or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so 'intentionally' if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it.¹ The words 'caused...person to believe a thing to be true' refer to the belief in a fact and not in a proposition of law.² "Believe a thing to be true," i.e., believe a fact to be true. The word 'thing' means fact.³ It must be found that the defendant by his act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. It is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendant had acted. It must be found that the plaintiff would not have acted as he did.⁴

A party relying upon this section has to establish not only that the opposite party had made a certain declaration but that the said declaration had been believed and had been acted upon and that it was not reasonably possible for the said party to know the true state of affairs by pursuing inquiries reasonably and with diligence. Where truth is accessible to a party, the plea of estoppel upon representation fails.⁵ A person cannot invoke the doctrine of estoppel unless he proves that he has been induced to change his position to his detriment by relying upon any declaration, act or omission of the person against whom the doctrine is invoked.⁶

Future promise does not create estoppel.—To create an estoppel there must be a representation by means of a declaration, act or omission that a thing is true, i.e., that the representation is as to some state of facts alleged to be at the time actually in existence. If the representation relates to a promise *de futuro*, it can be binding not as an estoppel but as a contract.⁷ A mere promise to do something in future will not create an estoppel.⁸

True facts known to both parties.—The section does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties.⁹

✓ Where the defendant knew that the buildings in dispute did not belong to him, but had been sold to the plaintiff, and, in spite of that fact, he chose of his own

¹ *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892) 19 I. A. 203, 219, 20 Cal. 296, 314, quoted in *Nihorbala Devi v. Shashadhar Ray Chaudhuri*, (1930) 58 Cal. 358, 364.

² *Rajnarain Bose v. Universal Life Assurance Co.*, (1881) 7 Cal. 594.

³ *Vishnu v. Krishnan*, (1883) 7 Mad. 3, F.B.; *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892) 19 I. A. 203, 20 Cal. 296; *Tek Chand v. Musammatt Gopal Devi*, (1912) P. R. No. 46 of 1912 (Civil).

⁴ *Narsingdas v. Rahimanbai*, (1904) 28 Bom. 440, 6 Bom. L. R. 440; *Jhinguri Tewari v. Durga*, (1885) 7 All. 878, F.B.

⁵ *Muhammad Shafi v. Muhammad Said*, (1929) 52 All. 248; *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892)

19 I. A. 203, 20 Cal. 296.

⁶ *Kazi Syed Karimuddin v. Meherunnisa Begum*, [1947] Nag. 341.

⁷ *Jelhabhai v. Nathabhai*, (1904) 28 Bom. 399, 407, 6 Bom. L. R. 428; *Rivett-Carnac v. New Mofussil Company*, (1901) 26 Bom. 54, 3 Bom. L. R. 846; *Parshottam v. Secretary of State*, (1937) 39 Bom. L. R. 1257.

⁸ *Ma Pyu v. Maung Po Chet*, (1916) 2 U. B. R. (1914-1916) 148.

⁹ *Honapa v. Narsapa*, (1898) 23 Bom. 406; *Mohori Bibee v. Dhurmodas Ghose*, (1903) 30 I. A. 114, 5 Bom. L. R. 421, 30 Cal. 539; *Ranchhodlal v. Secretary of State*, (1910) 13 Bom. L. R. 92, 35 Bom. 182; *Jacks & Co., v. Joosab Mahomed*, (1923) 48 Bom. 38, 25 Bom. L. R. 1170.

accord to incur expenditure by repairing these buildings, it was held that he could not raise any plea of estoppel.¹

Estoppel does not require fraudulent intention.—It is not essential that the person making the representation which induces another to act must be influenced by a fraudulent intention. A fraudulent intention is not necessary to create an estoppel. The determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it.² The section “does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. . . . What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.” If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do.³

“An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel.”⁴ There may be statements made, and which have induced another party to do that from which otherwise he would have abstained, which cannot properly be characterised as misrepresentation, but which amount to estoppel.⁵

Estoppel must be unambiguous.—To create an estoppel against a party his declaration, act or omission must be of an unequivocal and unambiguous character.⁶ An estoppel to have any judicial value, must be clear and non-ambiguous; it must also be free, voluntary and without any artifice.⁷

Estoppel on point of law.—Estoppel refers to a belief in a fact and not in a proposition of law. A person cannot be estopped for a misrepresentation on a

¹ *Nawab Zakia Begam v. The Lucknow Improvement Trust*, (1937) 13 Luck. 192.

² *Cairncross v. Lorimer*, (1860) 3 Macq. H. L. C. 827.

³ *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892) 19 I. A. 203, 215, 20 Cal. 296, 310, overruling *Ganga Sahai v. Hira Singh*, (1880) 2 All. 809, F.B.; *Vishnu v. Krishnan*, (1883) 7 Mad. 3, F.B.; *Assudibai v. Haribai*, [1943] Kar. 227.

⁴ Per Lord Esher, M. R., in *Seton*

v. Lafone, (1887) 19 Q. B. D. 68, 70.

⁵ *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892) 19 I. A. 203, 20 Cal. 296.

⁶ *Gajanan v. Nilo*, (1904) 6 Bom. L. R. 864; *Gaura Dei, Musammam v. Raja Mohammad Yasin Ali Khan*, (1934) 10 Luck. 361.

⁷ *Mowji v. National Bank of India*, (1900) 2 Bom. L. R. 1041, 25 Bom. 499; *Rani Mewa Kuwar v. Rani Hulas Kuwar*, (1874) 1 I. A. 157.

point of law. An admission on a point of law is not an admission of a "thing" so as to make the admission matter of estoppel.¹ [Where persons merely represent their conclusions of law as to the validity of an assumed or admitted adoption, there is no representation of a fact to constitute an estoppel.²

A party is not bound by his pleader's admission on a point of law.³

No estoppel against statute.—The principle of estoppel cannot be invoked to defeat the plain provisions of a statute.⁴ There is no estoppel against an Act of Legislature.⁵ Estoppel only applies to a contract *inter partes*, and it is not competent to parties to a contract to estop themselves or any body else in the face of an Act.⁶ The rule of estoppel is one of evidence. It ought not to prevail against a plain and mandatory provision of law.

The plaintiff and the defendant exchanged adjacent plots of land each worth more than a hundred rupees by means of an unregistered deed, both believing that they had effected a valid transfer. Possession was taken by each party and defendant began to erect a very costly building placing a wall thereof in the land he had acquired in exchange. While the building was in progress, the plaintiff demanded and obtained Rs. 525 from the defendant on the ground that the plot he parted with was found to be more in extent than the defendant's. After the completion of the building the plaintiff sued the defendant for recovery of his plot after removal of the defendant's building on it. The defendant pleaded that the plaintiff was estopped by his conduct from recovering the plot. It was held that the plaintiff was not estopped and that he was entitled to recover his plot owing to the absence of a registered deed of exchange as required by ss. 54 and 118 of the Transfer of Property Act.⁷

Estoppel by silence.—Whenever there is a duty owing by one person towards another to speak or act which he has failed to perform and the other party has been led by such silence to change his position, such silence would operate as estoppel against the former. But where there is no duty to speak, no estoppel can arise.⁸ When silence is of such a character and under such circumstances that it would be fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel.⁹ A man is bound to speak out in certain cases, and his very silence becomes as expressive as if he has openly consented to what is said or done and had become a party to the transaction.

Estoppel by recital in deed.—A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which,

¹ *Jagwant Singh v. Silan Singh*, (1899) 21 All. 285.

² *Dhanraj v. Soni Bai*, (1925) 27 Bom. L. R. 837, 52 I. A. 231, 52 Cal. 482.

³ *Narayan v. Venkatacharya*, (1904) 28 Bom. 408, 6 Bom. L. R. 434; *Krishanji v. Rajmal*, (1899) 24 Bom. 360, 2 Bom. L. R. 25.

⁴ *Jagabandhu Saha v. Radha Krishna Pal*, (1909) 36 Cal. 920; *Abdul Aziz v. Kanthu Mallik*, (1910) 38 Cal. 512; *Dhanu Pathak v. Sona Koeri*, (1936) 15 Pat. 589, s.b.; *Ma Mo E v. Ma Kun Hlaing*, [1941] Ran. 309.

⁵ *Shridhar v. Babaji*, (1914) 16 Bom. L. R. 586, 38 Bom. 709; *Ahmed Bhauddin v. Babu*, (1929) 31 Bom. L. R. 778, 53 Bom. 676.

⁶ *Barrow's case*, (1880) 14 Ch. D. 432, 441; *Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti*, (1895) 19 Mad. 200.

⁷ *Ramanathan v. Ranganathan*, (1917) 40 Mad. 1134.

⁸ *Jones Brothers (Holloway) Ltd. v. Woodhouse*, [1923] 2 K. B. 117.

⁹ *Jakhomull Mehera v. Saroda Prosad Dey*, (1308) 7 C. L. J. 604; *Dhanpat Rai v. Guranditta Mal*, (1921) 2 Lah. 258.

like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be.¹

Estoppel by election.—Where a man has an option to choose one or other of two inconsistent things, when once he has made his election, it cannot be retracted, it is final and cannot be altered.² Where a person having two inconsistent alternative remedies chooses to enforce one and thereby induces another to alter his position, an estoppel may arise on the principle that no man can approbate and reprobate at the same time. If a person chooses to accept a legacy under a will, he will be estopped from setting up a title contrary to its provisions.³

A party cannot say at one time, that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage.⁴

Estoppel by taking up a particular position.—If the parties have taken up a particular position before the Court at one stage of the litigation it is not open to them to approbate and reprobate and to resile from that position.⁵

Estoppel by attestation.—The Privy Council has held that attestation of a deed does not by itself estop the person attesting from denying that he knew of its contents or that he consented to the transaction which it effects, and that knowledge of the contents of a deed is not to be inferred from the mere fact of attestation.⁶ If A, with the knowledge that the recital in a sale-deed that the land, thereby conveyed, belongs to B, and is in his (B's) enjoyment as owner, attests the sale-deed executed by B in favour of the plaintiff he is estopped from setting up thereafter his title to the land, even though he (A) might be the certified purchaser of the same in a previous Court auction.⁷ A person, who to his knowledge is entitled to one-half share in a shop and allows his co-sharer to mortgage the whole shop, signing the mortgage deed as a witness and identifying the mortgagor and mortgagee at the time of registration, is estopped from bringing a subsequent suit against the mortgagee, claiming a declaration of his right to one-half share in the mortgaged property.⁸

Constructive estoppel.—There is no such thing known to the law as constructive estoppel.⁹

Estoppel by crediting cheque.—Credit given in a pass-book binds the banker, if on the faith of such credit the customer has altered his position, as by drawing on the credit, etc., for by entering the sums to the customer's credit, they lead him to suppose that they have received them on his account. When, however, there has been no such alteration, the banker is allowed to show that the entries were made by mistake; for the pass-book is only prima facie evidence against him.¹⁰

¹ *Brajeshware Peshkar v. Budhan-uddi*, (1880) 6 Cal. 268; *Tehitram Girdharidas v. Kashibai*, (1908) 10 Bom. L. R. 403, 33 Bom. 53.

² *Scarff v. Jardine*, (1882) 7 App. Cas. 345, 360.

³ *Probodh Lal Kundu v. Harish Chandra Dey*, (1904) 9 C. W. N. 309.

⁴ *Ambu Nair v. Kelu Nair*, (1933) 35 Bom. L. R. 807, 60 I. A. 266, 56 Mad. 787.

⁵ *Udraj Raj Singh v. Rani Bahal Singh*, [1946] All. 549.

⁶ *Pandurang Krishnaji v. Markandeya Tukaram*, (1921) 49 Cal. 334, 24 Bom. L. R. 557, 49 I. A. 16.

⁷ *Kandasami v. Nagalinga*, (1912) 36 Mad. 564.

⁸ *Shori Lal v. Damodar Das*, (1937) 18 Lah. 783.

⁹ *Parsotam Gir v. Narbada Gir*, (1899) 26 I. A. 175, 1 Bom. L. R. 700, 21 All. 505.

¹⁰ *Mowji v. National Bank of India*, (1900) 2 Bom. L. R. 1041, 25 Bom. 499.

Estoppel by consent decree.—An estoppel by consent decree can arise only when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. In order to effect an estoppel it is also necessary that it should appear on record that the question had been put in issue.¹

Estoppel against estoppel.—The maxim is 'estoppel against an estoppel sel-eth the matter at large.' In a case of one estoppel against another, the parties are set free and the Court has to see what their original rights really are.

Estoppel gives no jurisdiction.—An estoppel against a party cannot give the Court jurisdiction where it has none.²

Family arrangement.—The family arrangement is a transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the peace or security of the family and the avoiding of family disputes and litigation, or to the saving of the honour of the family.³ Parties agreeing to the arrangement and acting upon it are estopped from questioning its validity or legality.

Feeding the estoppel.—The equitable principle of feeding the estoppel has been recognised to some extent in s. 43 of the Transfer of Property Act, 1882, which says that where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. But the right of transferees in good faith for consideration without notice of the existence of the said option shall not be impaired. In such cases the subsequent interest enuring to the benefit of the transferor is said to feed the estoppel which is subsisting in the transferee so as to preclude the transferor from contending that the transferee has no right to his subsequently acquired property.⁴ This principle applies in the case of sale, mortgage, lease, or any such grant.⁵

CASES.—**Submission to Court.**—In 1906 the Government of Bombay compulsorily acquired certain land belonging to the defendant, and as a result of proceedings under the Land Acquisition Act paid to the defendant in 1912 the amount of compensation awarded by the High Court. In 1924, Government, discovering that the land was of their ownership, sued to recover the money from the defendant, as money paid to him under a mistake. It was held that they were estopped in view of the position taken up by them in the land acquisition proceedings and the consequent alteration in the position of the defendant.⁶

Mortgagee concealing his lien.—A mortgagee who caused the mortgaged property to be sold in execution of a decree other than a decree obtained upon his mortgage, without notifying to intending purchasers the existence of his mortgage

¹ *Gokul Prasad v. Saran Das Mahant*, (1946) 22 Luck. 270.

² *Saiyid Mohd. Mohsin v. Saiyid Ainul Husain*, (1946) 22 Luck. 283.

³ Halsbury's Laws of England, 2nd Edn., Vol. XV, p. 2.

⁴ *Krishna Chandra Ghosh v. Rasik Lal Khan*, (1916) 21 C. W. N. 218.

⁵ *Deolie Chand v. Nirban Singh*, (1879) 5 Cal. 253; *Vithabai v. Malhar*, (1937) 40 Bom. L. R. 147, [1938] Bom. 155.

⁶ *Secretary of State v. Tatyasaheb Holkar*, (1931) 34 Bom. L. R. 791, 56 Bom. 501; *Govind Vaman v. Sakharam Ramchandra*, (1878) 3 Bom. 42.

lien, was held to be estopped for ever from setting up that lien against the title of a bona fide purchaser.¹

Representation that lease is permanent.—Where a lessor, being either ignorant of his rights or uncertain of their extent, by his own act or representation created or induced in the mind of his tenants a mistaken belief that he had a permanent interest in the land and might build thereon, and the tenant, relying upon the act or representation so made, treated his interest as permanent and incurred expense in building which he would not otherwise have done, it was held that the lessor was estopped from denying the truth of that which it represented.² In 1894 the appellant agreed in writing to give the respondent a lease of a plot of land "for the purpose of erecting buildings . . . from year to year at an annual rental of Rs. 180," and the respondents took possession. In 1903 the respondents wished to build a pucca house upon the land, and in answer to inquiries the appellant wrote a letter stating that the lease was a permanent lease though the rent was liable to enhancement. Acting upon that letter the respondent built a house; the appellant knew of the building and received a bonus in respect of it. In 1916, the appellant sued to eject the respondent from the land. It was held that, whether or not the letting was a permanent one upon the construction of the agreement, the statement in the letter that it was so was a representation of fact, not an expression of opinion and that the appellant was estopped from denying that the letting was of that character though subject to enhancement of rent.³

Agreement to abide by decision of commissioner.—In a suit for possession of land, the plaintiffs and defendants, while the case was in the trial Court, applied that a pleader might be appointed as Commissioner to ascertain who held the land on either side of the passage in dispute and agreed that, if the plaintiffs were found in possession of such land, they should get a decree; while, if defendant No. 1 was found in possession, the suit should be dismissed. Accordingly, a Commissioner was appointed, and the plaintiffs' suit was decreed in accordance with the Commissioner's report. It was held that the agreement between the parties to abide by the decision of the Commissioner on the fact of possession was a valid agreement, and that, when that agreement was given effect to and carried out, it would be inequitable to allow the defendants to resile from it, as they were estopped in equity from so doing.⁴

Trustee mortgaging trust property as his own cannot dispute sale by mortgagee.—A trustee, alleging that the trust property, consisting of land was his own property, mortgaged it. The mortgagee took the mortgage in good faith, for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this none of the beneficiaries under the trust were parties. It was held that the plaintiff was estopped by his conduct from recovering possession of the land.⁵

¹ *Muhammad Hamid-ud-din v. Bansi Singh v. Chakradhar Prashad*, (1899) 21 All. 309; *Agar-chand Gumanchand v. Rakhma Han-mant*, (1888) 12 Bom. 678; *R. M. P. A. L. Chettiar Firm v. Ko Maung Gale*, (1935) 13 Ran. 346.

(1938) 17 Pat. 358.

³ *Forbes v. Ralli*, sup.

² *Forbes v. Ralli*, (1925) 27 Bom. L. R. 860, 52 I. A. 178, 4 Pat. 707;

⁴ *Bahir Das Chakravarti v. Nobin Chunder Pal*, (1901) 29 Cal. 306.

⁵ *Gulzar Ali v. Fida Ali*, (1888) 6 All. 24.

Profession of Muhammadanism.—In a suit for divorce from a Muhammadan husband, brought by a Burmese woman professing the Buddhist faith, but at the time of her marriage, simulating conversion to Islam, and married with Muhammadan ceremonies, it was held that the Muhammadan law should form the rule of decision.¹

Adoption.—In a suit to set aside an adoption brought by the adoptive mother against her adopted son it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant; that the ceremony of adoption was carried out on the faith of this representation and that the marriage of the defendant was likewise on the strength of it celebrated, and the defendant performed the *sraddha* ceremony of his adoptive father. It was further found that the defendant had been obliged to defend a suit brought against him by an alleged reversioner to the estate of his adoptive father, and that for this purpose he had incurred heavy liabilities. It was held that the plaintiff was estopped from maintaining a suit for a declaration that the adoption was without authority and void.² A childless Hindu widow agreed with the plaintiff's father to adopt the plaintiff, stating that her husband had given her authority to adopt. Subsequently she adopted the plaintiff and had his thread-ceremony performed in the adoptive family next day, and administered her husband's property as the minor's guardian for about eighteen months, when she repudiated the adoption and refused to maintain the plaintiff. It was held that the adoption being invalid on the ground that the widow had not, as a fact, acted under authority from her husband, she was not estopped from denying the adoption by the fact of her having treated it as effective for the period of eighteen months. In order that an estoppel by conduct may raise the invalid adoption to the level of a valid adoption, there must have been a course of conduct long continued on the part of the adopting family, and the situation of the adoptee in his original family must have become so altered that it would be impossible to restore him to it.³

116. No tenant of immoveable property,¹ or person claiming through such tenant, shall, during the continuance of the tenancy,² be permitted, to deny that the landlord of such tenant had, at the beginning of the tenancy,³ a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession⁴ thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

COMMENT.—The section deals with estoppel of (1) a tenant, and (2) a licensee of the person in possession. It is not exhaustive as containing all kinds of estoppel which may arise between landlord and tenant. It postulates that there is a tenancy still continuing⁴ and that it had its beginning at a given date from a given landlord, and provides that neither a tenant nor any one claiming through a

¹ *Kumal Sheriff v. Mi Shwe Ywet*, (1875) S. J. L. B. 49.

² *Dharam Kunwar v. Bakwant Singh*, (1908) 30 All. 549. See *Muhammad Niaz-ud-din Khan v. Muhammad Umar Khan*, (1906) P. R. No. 1 of 1907 (Civil).

L. E.—16.

³ *Parvatibayamma v. Ramkrishna Rau*, (1894) 18 Mad. 145. See *Sirdarni Dharam Kour v. Randhir Singh*, (1882) P. R. No. 169 of 1882 (Civil).

⁴ *Sheikh Rashid v. Hussain Baksh*, [1943] Nag. 340.

tenant shall be heard to deny that the particular landlord had at that date a title to the property, and there is no exception even for the case where the lease itself discloses the defect of title. In the ordinary case of a lease intended as a present demise the section applies, against the lessee, any assignee of the term and a sub-lessee or licensee.¹ The estoppel under this section is wide enough to cover the case of a grantee who occupies and enjoys under a grant disputing the grantor's title. Even a mere attornment creates an estoppel against the tenant but that estoppel is not the same as is given statutory effect by this section. There are other kinds of estoppel between tenant and landlord which fall outside the scope of the section. Such an estoppel does not prevent the tenant from showing that he attorned in ignorance of the fact that the landlord has no title. The test for the purposes of this section is whether the attornment creates a new tenancy.² The rule of estoppel embodied in this section is not applicable to the case of a tenant who purchases subsequently the share of a co-sharer in the leased property and files a suit for partition on the basis of such purchase. The doctrine of estoppel which operates between landlord and tenant has no application to the same parties even while the tenancy exists, where the question of title arises between them, not in the relation of landlord and tenant, but of vendor and purchaser.³

The estoppel of a tenant is founded upon contract between the tenant and his landlord. It is one of the most noticeable instances of estoppel by contract. The estoppel disappears if the landlord's title is extinguished subsequent to the inception of the tenancy, or if there is eviction by title paramount.⁴

Where a man having no title obtains possession of land under a demise by a man in possession, who assumes to give him a title as tenant, he cannot deny his landlord's title; as, for instance, if he takes for twenty-one years and he finds the landlord has only five years' title, he cannot alter the five years set up against the landlord the *jus tertii*, though, of course, the real owner can always recover against him. That is a perfectly intelligible doctrine. He took possession under a contract to pay the rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits, and under whose title he took possession, has not a title.⁵ This is estoppel by contract. The estoppel arises, not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor.⁶

There is no distinction between the relation of a tenant and that of a licensee in whose case the law itself implies a tenancy and to whom the same principles apply.⁷

Whether tenant should be in possession of property to estop him from denying his landlord's title.—The Privy Council has laid down that a tenant is estopped from denying his landlord's title whether he was or was not already

¹ *Krishna Prasad Lal Singha Deo v. Baraboni Coal Concern*, (1937) 64 I. A. 311, 39 Bom. L. R. 1034, [1938] 1 Cal. 1; *Ata Muhammad v. Shankar Das*, (1925) 6 Lah. 319; *Yusuf v. Jyotishchandra Banerji*, (1931) 59 Cal. 15.
² *Nadjarian v. Trist*, (1944) 47 Bom. L. R. 209.

³ *Muhammad Hussain v. Abdul Gaffoor*, [1946] Mad. 44.

⁴ *Krishna Prasad Singh v. Adya-ath Ghatak*, (1943) 22 Pat. 513.

⁵ *Per Jessel, M. R.*, in *In re Stringer's Estate, Shaw v. Jones-Ford*, (1877) 6 Ch. D. 1, 9; *Vertannes v. Robinson*, (1927) 29 Bom. L. R. 1017, 54 I. A. 276, 5 Ran. 427; *Musammal Bilas Kunwar v. Desraj Ranjit Singh*, (1915) 17 Bom. L. R. 1006, 42 I. A. 202, 37 All. 557.

⁶ *Bamandas Bhattacharjee v. Nilmadhab Sahu*, (1916) 44 Cal. 771, 777.

⁷ *Doe dem. Johnson v. Baylup*, (1835) 3 Ad. & El. 188.

in possession of the property at the time when he took his lease.¹ The Bombay,² the Madras,³ and the Allahabad⁴ High Courts have held similarly. The decisions of the Calcutta High Court are not unanimous on the point.⁵ A tenant who wishes to dispute his landlord's title must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord's title.⁶ The estoppel operates in the case of a tenant who remains in possession even after the termination of the tenancy of notice to quit.⁷

1. 'Immoveable property'.—A several fishery is considered immoveable property for the purposes of this section.⁸

2. 'During the continuance of the tenancy'.—A tenant is only precluded, during the continuance of the tenancy, from denying that the landlord had 'at the beginning of the tenancy' a title to the property, the subject of the tenancy, and not to any other point of time. The section is no bar to a tenant showing that his landlord had no title at a date previous to the commencement of the tenancy. The words of the section leave it open to the tenant to show that his landlord's title has subsequently expired.⁹ If the term of lease has expired when a suit is brought, the tenant can dispute the title of the landlord. Though the tenancy may be continuing, it is quite open to the tenant to plead and show that his liability to pay the rent has wholly or partially or for a time ceased: such a plea is really one of confession and avoidance (not denial), and has been held available to the tenant.¹⁰

3. 'At the beginning of the tenancy'.—This section only provides that a tenant cannot be permitted to deny that the landlord at the beginning of the tenancy had a title to the property. The section does not disentitle a tenant to dispute the derivative title of one who claims, since the beginning of the tenancy, to have become entitled to the reversion. In that sense the principle only applies to the title of the landlord who "let the tenant in" as distinct from any other person claiming to be reversioner.¹¹ The tenancy under this section does not begin afresh

¹ *Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern*, (1937) 64 I. A. 311, 39 Bom. L. R. 1034, [1938] 1 Cal. 1; *Musammam Bilas Kunwar v. Desraj Ranjit Singh*, (1915) 17 Bom. L. R. 1006, 42 I. A. 202, 37 All. 557, 567; *Vertannes v. Robinson*, (1927) 29 Bom. L. R. 1017, 54 I. A. 276, 5 Ran. 427.

² *Vtsudeo Daji v. Babaji Ranu*, (1871) 8 B. H. C. (A. C. J.) 175; *Shankar v. Jagannath*, (1928) 30 Bom. L. R. 741.

³ *Venkata Chetty v. Aiyanna Goundan*, (1916) 40 Mad. 561, F.B.

⁴ *Ganpat Rai v. Multan*, (1916) 38 All. 226, 228.

⁵ *Lal Mahomed v. Kallanus*, (1885) 11 Cal. 519, dissented from in *Nagindas Sankalchand v. Bapalal Purshottam*, (1930) 54 Bom. 487, 32 Bom. L. R. 692; *Ketu Das v. Surendra Nath Singha*, (1903) 7 C. W. N. 596.

⁶ *Ekoba v. Dayaram*, (1919) 22

Bom. L. R. 82; *Patel Kilabhai Lallubhai v. Hargovan Mansukh*, (1894) 19 Bom. 133.

⁷ *Mujibar Rahman v. Isab Surato*, (1928) 56 Cal. 15.

⁸ *Lakshman v. Ramji*, (1920) 23 Bom. L. R. 939.

⁹ *Bala v. Abai*, (1909) 11 Bom. L. R. 1093; *Devidas v. Shamal*, (1919) 22 Bom. L. R. 149; *Ata Muhammad v. Shankar Das*, (1925) 6 Lah. 319; *Deena Bundhu Gan v. Makim Sardar*, (1935) 63 Cal. 763; *Krishna Prosad Lal Singha Deo v. Baraboni Coal Concern*, supra.

¹⁰ *Jogendra Lal Sarkar v. Mohesh Chandra Sadhu*, (1928) 55 Cal. 1013, *Shantabhai v. Narayan Rao*, [1948] Nag. 290.

¹¹ *Krishna Prosad Lal Singh Deo v. Baraboni Coal Concern*, supra.

every time the interest of the tenant or of the landlord devolves upon a new individual by succession or assignment.¹

4. 'No person who came upon any immoveable property by the license of the person in possession'.—Where it is proved that the occupation by a person of immoveable property is by permission of another, the occupier is estopped from denying the other's title.² "There is no distinction between the case of a tenant and that of a common licensee. The licensee, by asking permission, admits that there is a title in the landlord. The law would imply a tenancy under such circumstances."³ Where defendant No. 1 came into possession of certain coal mining lands as a licensee of the plaintiff, and subsequently defendant No. 2, as the assignee of, and claiming through, defendant No. 1, entered into possession thereof, it was held that the possession of the lands by both the defendants must be attributed to the possession given to defendant No. 1 by the plaintiff and they were both barred by this section from questioning the plaintiff's title to those lands until they had surrendered possession thereof again to him.⁴

Mortgagor and mortgagee.—As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. A mortgagor cannot derogate from his grant so as to defeat his mortgagee's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property.⁵ The rule of estoppel between the mortgagor and the mortgagee cannot be invoked in a case where the suit is not based on the mortgage, but is one in repudiation of the mortgage.⁶ Where the object of a mortgage is to defraud a third person and the mortgagee is cognisant of and indeed a party to that intended fraud, the mortgagor is not estopped from pleading and proving against his mortgagee seeking to enforce the mortgage that it was a sham transaction, a device to defeat a possible attachment of the properties by a creditor.⁷ A mortgagor of immoveable property is not estopped from pleading, or taking advantage of, the invalidity of his mortgage deed on the ground that, by the inclusion of a fictitious property in the document and getting it registered in an office where otherwise it could not have been registered, a fraud on the registration law was committed in which he participated.⁸

Benami title.—The Madras High Court has held that where a lease is executed by a tenant in favour of a *benamidar*, the real owner and not the *benamidar* is regarded as the landlord whose title the tenant is estopped from denying under this section. In a suit by such *benamidar* for rent, the tenant can deny his right to sue on the ground that he is not the person entitled. A *benamidar* has no right to sue unless he can show a legal right to sue under the general law.⁹ The Calcutta High Court is of the opinion that a tenant is estopped from raising the question that his lessor is a *benamidar* of some one to whom he has paid rent.¹⁰

¹ *Krisna Prosad Lal Singh Deo v. Baraboni Coal Concern*, (1937) 64 I. A. 311, 39 Bom. L. R. 1035, [1938] 1 Cal 1.

² See *Mah Hui v. Maung San Dun*, (1892) P. J. L. B. 4.

³ Per Coleridge, J., in *Doe dem. Johnson v. Baytup*, (1835) 3 Ad. & El. 188, 192.

⁴ *Currimbhoy & Co. v. Creet*, (1932) 35 Bom. L. R. 223, 60 I. A. 297, 60 Cal. 980.

⁵ *Hillaya v. Narayanappa*, (1911) 18 Bom. L. R. 1200, 36 Bom. 185.

⁶ *Musammatt Rajna v. Musahab Ali*, (1937) 18 Luck. 178.

⁷ *Arunachalam v. Rengaswami*, (1935) 59 Mad. 289.

⁸ *Ramanandan Prasad Narayan Singh v. Chandradip Narain Singh*, (1940) 19 Pat. 578.

⁹ *Kuppu Konan v. Thirugnana Sammandam Pillai*, (1908) 31 Mad. 461; *Bogar v. Karam Singh*, (1906) P. R. No. 141 of 1906 (Civil).

¹⁰ *Deena Bandu Gan v. Makim Sardar*, (1935) 63 Cal. 763.

The defendant entered into possession of plaintiff's property by executing a registered agreement, but no lease was executed. In a suit by the plaintiff to recover rent, the defendants pleaded that without a lease there was no contract of tenancy and that the plaintiff was not entitled to recover the rent. It was held that in view of the fact that the defendants entered into and continued in occupation of the land with the plaintiff's consent, they could not be heard to say that they were not liable for rent for use and occupation.¹

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Estoppel of acceptor of bill of exchange, bailee or licensee.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

COMMENT.—This section deals with further instances of estoppel by agreement. Sections 116 and 117 are however not exhaustive of the doctrine of estoppel by agreement.² Agents, for instance, are not ordinarily permitted to set up the adverse title of a third person to defeat the rights of their principals.

Under this section an acceptor of a bill of exchange cannot deny that the drawer had authority to draw such bill or to endorse it. But he may deny that the bill was really drawn by the person by whom it purports to have been drawn (expln. 1). A bailee or licensee cannot deny that his bailor or licensor had, at the commencement of the bailment or license, authority to make the bailment or grant the license. But a bailee, if he delivers the goods bailed to a third person, may prove that such person had a right to them as against the bailor (expln. 2).

Bill of exchange.—Estoppels in the case of negotiable instruments are instances of estoppel by agreement or contract. See ss. 41 and 42 of the Negotiable Instruments Act.

“The acceptance of a bill of exchange is also deemed a *conclusive admission*, as against the acceptor, of the existence of the drawer and the genuineness of his signature, and of his capacity to draw, and, if the bill be payable to the order of the drawer, of his capacity to indorse, and, if it be drawn by procuration, of the authority of the agent to draw in the name of the principal. It matters not in this respect whether the bill be drawn before or after the acceptance.”³

Forged endorsement.—No person can claim a title to a negotiable instrument through a forged endorsement. Such endorsement is a nullity and must be taken as if no such endorsement was on the instrument.⁴

¹ *Sheo Karan Singh v. Maharaja Parbhu Narain Singh*, (1909) 31 All. 276, F.B.

² *Rup Chand Ghosh v. Sarveswar*

Chandra Chandra, (1906) 33 Cal. 915.

³ Taylor, 12th Edn., s. 851, p. 534.

⁴ *Banku Behari Sikdar v. Secretary of State for India*, (1908) 36 Cal. 239.

English law.—This section is in accordance with English law, except as to the first explanation under which the acceptor may show that the signature of the drawer is a forgery, while in England he is not allowed to do so on the ground that he is bound to know his own correspondent's signature.

Bailee.—The bailee and the licensee are placed in the same position as the tenant in the preceding section. The bailee is protected by the bailor's title so long as any better title is not advanced. A bailee entrusted with the care of goods is estopped from claiming that the bailor had no title at the time of bailment. He cannot set up the title of a third person. But the bailee has no better title than the bailor, and consequently if a person entitled as against the bailor claims the goods, the bailee has no defence against him.

Licensee.—As between landlord and tenant so between licensor and licensee the former's right cannot be questioned by the latter. A licensee cannot be permitted to deny that his licensor had at the time when the license commenced authority to grant such license. The licensee of a trade-mark cannot put an end to the relation of a licensor and licensee by repudiating the contract, inasmuch as the concurrence of the other party is essential. In a suit for royalty, brought by the licensors of certain jute trade-marks against the licensees, the defence taken was that the plaintiffs had no title to the marks in question, and that the license was void. It was held that by virtue of this section the licensees were estopped from questioning their licensor's title, or the validity of the license.¹

CHAPTER IX.

OF WITNESSES.

✓ 118. All persons shall be competent to testify¹ unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

COMMENT.—Under this section all persons are competent to testify, unless they are, in the opinion of the Court, (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii) disease of mind or body, or (iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers, is a competent witness.

Scope.—This section does no more than enunciate the English rule with regard to the competency of parties as witnesses without in any way making admissible all the evidence, which might be given by them. In this connection the provisions of s. 112 must not be overlooked.²

1. 'Competent to testify'.—The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affir-

¹ *Hannah v. Juggernath & Co.*, (1914) 42 Cal. 262.

² *Sweeney v. Sweeney*, (1935) 62 Cal. 1080.

mation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under this section, has not to enter into inquiries as to the witnesses' religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational and intelligent account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established.¹ If a boy in spite of his smallness can both understand questions and give rational answers to them he should be examined.²

With respect to *children*, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must depend upon the good sense and discretion of the Judge. In practice, it is not unusual to receive the testimony of children of eight or nine years of age when they appear to possess sufficient understanding.³ The Privy Council has held that a Court can receive evidence of a person who does not understand the nature of an oath but is otherwise competent to testify, as understanding the questions put and being able to give rational answers. A girl not more than ten years old was tendered by the Crown as the only eye-witness at the trial of the accused for murder. The trial Judge found that she was competent to testify as she appeared to be intelligent for her age and gave her answers frankly and without hesitation but she was not able to understand the nature of an oath. It was held that such unsworn evidence was admissible in the circumstances of the case.⁴

The Court is not bound, before taking the deposition of a child witness, to ascertain by a preliminary examination whether the child has capacity to understand the questions put to it and to give rational answers to them, but the competency of such a witness may be tested during the course of its examination.⁵

The section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. The proposition that the competency of the witness should be tested before his examination is commenced is not quite justified by the provisions of this section. According to the Bombay and the Rangoon High Courts when a witness is of tender years the Court should satisfy itself that the witness is competent to testify.⁷ The object of putting questions to a child witness is that the time of the Court should not be wasted if it is found, as the result of a preliminary inquiry, that the child is neither intelligent nor can he give evidence which may be acceptable.⁸ But there is no legal obligation to ask preliminary questions.⁹

¹ *Queen-Empress v. Lal Sahai*, 41 Cal. 406.
(1888) 11 All. 183.

² *Queen-Empress v. Ram Sewak*,
(1900) 23 All. 90.

³ Taylor, 12th Edn., s. 1377, p. 869.

⁴ *Mohamed Sugal v. The King*,
(1945) 48 Bom. L. R. 138, P.C., approving
Queen v. Sewa Bhogta, (1874) 14 Beng.
L. R. 294, F.B., and disapproving *Queen-*
Empress v. Maru, (1888) 10 All. 207.

⁵ *Nafar Sheikh v. Emperor*, (1913)

⁶ *Krishna Kahar v. Emperor*,
[1939] 2 Cal. 569.

⁷ *Emperor v. Hari*, (1918) 20 Bom.
L. R. 365; *Ah Phut v. The King*,
[1940] Ran. 104.

⁸ *Karu Singh v. Emperor*, (1941)
20 Pat. 893.

⁹ *Lakhan Singh v. King-Emperor*,
(1941) 20 Pat. 898.

A Court can receive evidence of a person who does not understand the nature of an oath but is otherwise competent to testify, as understanding the questions put and being able to give rational answers.

A girl not more than ten years old was tendered by the crown as the only eye-witness at the trial of the accused for murder. The trial Judge found that she was competent to testify as she appeared to be intelligent for her age and gave her answers frankly and without hesitation. He however found that she was not able to understand the nature of an oath. He admitted the unsworn evidence of the girl and sentenced the accused to death. On the question of the admissibility of such evidence it was held that such unsworn evidence was admissible in the circumstances of the case.¹

There was a conflict of opinion on the question whether the omission to administer an oath or affirmation under the Oaths Act to a witness of tender years rendered his evidence inadmissible. The amended s. 5 of the Indian Oaths Act² provides that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion, that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the provisions relating to oath or affirmation shall not apply to such witness, and the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

Explanation.—The explanation applies to the case of a monomaniac or person afflicted with partial insanity. Such a person will be an admissible witness if the Judge finds him upon investigation capable of understanding the subject in respect of which he is required to testify.³ An insane or an idiot is not a competent witness if he is incapacitated to such an extent that he is unable to understand the subject in reference to which he is called as a witness.

When accused competent witness.—An accused person is competent to testify within this section, but he is incompetent to be a witness, for an oath cannot be administered to him, and without it no witness can be lawfully examined, or give evidence, by or before a Court.⁴ Where there are two accused a Magistrate cannot convert one of them into a witness against the other except when a pardon has been lawfully granted.⁵ Where two persons are jointly charged and tried and are convicted, and a new trial is afterwards ordered of one of such persons, the other person can upon such trial be lawfully examined as a witness.⁶ Where there are several accused persons, one of whom is a European British subject and claims to be tried by a special jury, the other accused who are to be tried separately can be competent witnesses in the trial before the special jury.⁷

CASE.—During the course of a police investigation into a case of house-breaking and theft, several persons were arrested, one of whom made certain dis-

¹ *Mohamed Sugul v. The King*, (1945) 48 Bom. L. R. 138, P.C.

² Act X of 1873, s. 5, as amended by Act XXXIX of 1939.

³ *Hill's case*, (1851) 2 Den. C. C. 254; *Spittle v. Walton*, (1871) L. R. 11 Eq. 420.

⁴ *King-Emperor v. Nga Po Min*, (1932) 10 Ran. 511, F.B.

⁵ *Reg. v. Hanmanta*, (1877) 1 Bom. 610. See *Nabi Bakhsh v. The*

Emperor of India, (1902) P. R. No. 12 of 1902 (Cr.); *Alladad v. The King-Emperor of India*, (1906) P. R. No. 9 of 1906 (Cr.).

⁶ *Muhammad Ali v. The Crown*, (1878) P. R. No. 23 of 1878 (Cr.); *King-Emperor of India v. Sobha Ram*, (1904) P. R. No. 8 of 1904 (Cr.).

⁷ *Empress v. Durant*, (1898) 23 Bom. 213.

closures to the police and pointed out several houses which had been broken into by his accomplices. Thereupon the police discharged him, and made him a witness. At the trial he gave evidence against his accomplices, who were all convicted. It was held that his evidence was admissible under this section though he had been illegally discharged by the police.¹

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Dumb witnesses.

COMMENT.—When a deaf-mute is a witness the Court will ascertain before he is examined that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. A deaf-mute's evidence may be taken (a) by written questions to which he may reply in writing or (b) by means of signs.

Where the witness had taken a religious vow of silence, and the Magistrate took his evidence in writing in open Court when he could not get it in any other way without forcing the witness to break his religious vow, it was held that the witness should be deemed unable to speak within the meaning of this section and the course adopted by the Magistrate was correct.²

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.

COMMENT.—Principle.—In civil proceedings parties to the suit are competent witnesses. Husbands and wives are competent witnesses for or against each other in civil as well as criminal proceedings.

English law.—In criminal cases a husband and wife are not competent witnesses for or against each other. A husband and wife are, however, competent to give evidence when an injury to person or property has been committed by the one against the other.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Judges and Magistrates.

ILLUSTRATIONS.

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

¹ *Queen-Empress v. Mona Puna*, (1892) 16 Bom. 661.

² *Lakhan Singh v. King-Emperor* (1941) 20 Pat. 898.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(c) A is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

COMMENT.—Principle.—Under this section a Judge or Magistrate shall not be compelled to answer questions as to (a) his conduct in Court as such Judge or Magistrate, or (b) anything which came to his knowledge in Court as such Judge or Magistrate, except upon the order of a Court to which he is subordinate. He may be examined as to other matters which occurred in his presence while he was so acting.

Sections 121-132 declare exceptions to the general rules that a witness is bound to tell the whole truth, and to produce any document in his possession or power relevant to the matter in issue.¹ They deal with the privilege of certain class of witnesses.

The privilege given by this section is the privilege of the witness, that is, of the Judge or Magistrate of whom the question is asked. If he waives such privilege, or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege.² The privilege of the Judge or the Magistrate extends only "to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate."

A distinction should be drawn between questions which a witness cannot be compelled to answer (ss. 121, 124 and 125) and those which he cannot be permitted to answer (ss. 123 and 126). The latter class of questions might properly be forbidden but questions of the former class are in no way barred; a witness has merely the right of refusing to answer such questions, without any hostile inference being drawn from his refusal. The most that a Court can do, in the case of a witness who is ignorant of his privilege, is to warn him that he need not answer. But if the witness elects to waive his privilege of refusing to answer, his answer is admissible in evidence.³

Judge or Magistrate as witness.—"A Judge, before whom the cause is tried, must conceal any fact within his own knowledge, unless he be first sworn, and, consequently, if he be the sole Judge, it seems that he cannot depose as a witness, though if he be sitting with others, he may then be sworn and give evidence. In this last case, the proper course appears to be that the Judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another."⁴

A person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons exercising similar judicial functions sitting with him at the same time.⁵

Where a Judge is the sole judge of law and fact, he cannot give evidence before himself or import matters into his judgment not stated on oath before the Court

¹ *The Queen v. Gopal Doss*, (1881) 12 Cr. L. J. 277.
3 Mad. 271, 277, F.B.

² *Empress of India v. Chidda Khan*, (1881) 3 All. 573, F.B.

³ *Mahomed Ally v. Emperor*, (1909)

⁴ Taylor, 12th Edn., s. 1379, p. 870.

⁵ *The Queen v. Mookta Singh*, (1870) 13 W. R. (Cr.) 60.

n the presence of the accused.¹ The accused is entitled to have nothing stated against him in the judgment which was not stated on oath in his presence, and which he had no opportunity of testing by cross-examination and of rebutting.² If the Judge knew any facts concerning the case, he is bound to state to the accused, so far as he could, what were the facts he himself observed, and to which he himself could bear testimony; and the accused in such situation has a right, if he thought it desirable, to cross-examine the Judge, whose evidence should be recorded, and form part of the record in the case.³

122. No person who is or has been married shall be compelled to disclose any communication¹ made to him during marriage² by any person to whom he is or has been married: nor shall he be permitted to disclose any such communication,³ unless the person who made it, or his representative in interest,⁴ consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Communications during marriage.

COMMENT.—Principle.—This section “rests on the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated ‘during the marriage.’”⁴ This section limits the rule enunciated in s. 120.

Under this section a married person shall not be

- (1) compelled to disclose any communication made to him during marriage by any person to whom he is married; and
- (2) permitted to disclose any such communication, except
 - (a) when the person who made it or his representative in interest consents, or
 - (b) in suits between married persons, or
 - (c) in proceedings in which one married person is prosecuted for any crime committed against the other.

1. ‘Compelled to disclose any communication’.—This expression implies that the party concerned is made or allowed to say or do something by way of disclosing a communication made during marriage.⁵ A document, even though it contains a communication from a husband to a wife or *vice versa*, in the hands of third persons, is admissible in evidence; for, in producing it, there is no compulsion on or permission to the wife or husband to disclose any communication.

¹ *Queen-Empress v. Manikam*, (1896) 19 Mad. 263; *Empress v. Donnelly*, (1877) 2 Cal. 405.

² *Girish Chunder Ghose v. The Queen-Empress*, (1898) 20 Cal. 857, 866; *Hari Kishore Mitra v. Abdul Baki Miah*, (1894) 12 Cal. 920.

³ *Hurro Chunder Paul*, In re, (1873) 20 W. R. (Cr.) 76.

⁴ Taylor, 12th Edn., s. 909-A, p. 572; *Emperor v. Ramachandra*, (1932) 35, Bom. L. R. 174.

⁵ *Queen-Empress v. Donaghue*, (1898) 22 Mad. 1, 4.

The section protects the individuals, and not the communications if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made.¹

2. 'During marriage'.—The protection conferred by the section is limited to such matters as have been communicated during marriage. A communication made to a woman before marriage would not be protected. But the privilege continues even after the marriage has been dissolved by death or divorce.

3. 'Permitted to disclose any such communication'.—Even if one of the spouse is willing to disclose a communication, he or she will not be permitted to disclose it unless the person who made it or his representative in interest consents, except in suits or prosecutions between married persons. The consent cannot be implied. It is incumbent upon the Court to ask the party against whom the evidence is to be given.

On a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of her house made there by the police, it was held that the letter was admissible in evidence against the accused.²

4. 'Representative in interest'.—Where there is no "representative in interest" who can consent, under this section, to the disclosure of communications made by a deceased husband to his wife during marriage, the wife should not be permitted, even if willing, to disclose such communications. The widow of a deceased husband is not his "representative in interest," for the purpose of giving such consent.³

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State,¹ except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.²

Evidence as to affairs of State.

COMMENT.—Principle.—On grounds of public policy, evidence derived from unpublished official records of State cannot be given, except with the permission of the head of the department concerned. The Court is bound to accept without question the decision of the public officer.

The only ground sufficient to justify non-production of an official document marked confidential is that production would not be in the public interest, for example where disclosures would be injurious to national defence or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service.⁴

The term 'evidence' refers to both oral and documentary evidence.⁵

1. 'Affairs of State'.—This will include any matter of a public nature with which the Government is concerned, i.e., all secrets of State, such as State papers and all communications between Government and its officers,—the privilege in such cases not being that of the person who is in possession of the secret, but that of the public, as a trustee for whom the secret has been entrusted to him.⁶

¹ *Queen-Empress v. Donaghue*, (1898) 22 Mad. 1, 3.

² *Ibid.*

³ *Nawab Howlader v. Emperor*, (1913) 40 Cal. 891.

⁴ *Tukaram v. King-Emperor*, [1946] Nag. 385.

⁵ Stokes, Vol. II, p. 919.

⁶ Best, 12th Edn., s. 578, p. 495.

Before any document is excluded in such a case on the ground that it relates to affairs of State, the Court must be satisfied that the mind of a responsible officer of Government has been brought to bear upon the question whether it is expedient in the public interest to give or withhold the information asked for, and that he has made his decision solemnly and with a due sense of responsibility.¹

The mere fact that a document is marked confidential will not afford sufficient justification for objecting to its production under this section, nor will it be a good ground that the production may involve a department of the Government in a discussion in the legislative assembly or in public criticism. Neither will it be a good ground that production may tend to expose a want of efficiency in administration or to lay the department open to claim for compensation.²

2. 'Who shall give or withhold permission as he thinks fit'.—These words clearly indicate that the Head of the Department, who is in possession of the document is the exclusive Judge of the fact whether the unpublished records are protected from production on the ground of their being related to affairs of State, and, therefore, the privilege claimed under the section by the Head of the Department that the document relates to the affairs of State has got to be allowed although the decision would be that of the Court. The Court simply gives effect to the decision of the Head of the Department by adding its own command to it but the Court has no power to examine the document in order to verify the correctness of the allegations or the grounds on which the privilege was claimed.³ Where a Government official desires to claim privilege under this section it is desirable, even if it is not essential, that he should put in a statement stating that he has considered the documents carefully and has come to the conclusion that they cannot be produced without injury to the public interests.⁴

CASES.—Statements made and documents produced by assessee before Income-tax officers for the purpose of showing the income of such assessee do not refer to matters of State, and are not privileged under this section.⁵ Statements made by witnesses in the course of a departmental enquiry into the conduct of police-officers who were subsequently put upon their trial on charges of taking illegal gratification are not privileged under this section or s. 124 or 125.⁶ The confidential record of the Controller of Stationery relating to the water-mark of cartridge papers cannot be compelled to be produced in Court.⁷

124. No public officer shall be compelled to disclose¹ communications made to him in official confidence,² when he considers that the public interests would suffer by the disclosure.³

COMMENT.—Object.—This section is designed to prevent the knowledge of official papers that is to say papers in official custody beyond that circle which would obtain knowledge of them in confidence whether the confidence was express or implied. It would normally include all officers including clerks of superior officers and might also apply to non-officials to whom such papers were disclosed on the

¹ *Bhaiya Saheb v. Pt. Ramnath Rampratap Bhadupote*, [1940] Nag. 280.

² *Tukaram v. King-Emperor*, [1946] Nag. 385.

³ *Khawaja Nazir Ahmad v. The Crown*, (1944) 26 Lah. 219.

⁴ *Tukaram v. King-Emperor*, sup.

⁵ *Venkatachella Chettiar v. Sampathu Chettiar*, (1908) 32 Mad. 6.

⁶ *Harbans Sahai v. Emperor*, (1912) 16 C. W. N. 431.

⁷ *Jaffarul Hossain v. Emperor*, (1931) 59 Cal. 1046.

understanding express or implied that the knowledge should go no further.¹ Public interests are paramount as compared with the individual interests of a party in a Court of Justice. It is absolutely essential to the welfare of the State that the names of parties who interpose in situations of this kind should not be divulged, for, otherwise,—be it from fear or shame, or the dislike of being publicly mixed up in inquiries of this nature,—few men would choose to assume the disagreeable part of giving or receiving information respecting offences, and the consequence would be that many great crimes would pass unpunished.²

Principle.—A public officer cannot be compelled to disclose communications made to him in confidence if he considers that public interests would suffer by this disclosure.

This section is confined to public officers; section 123 embraces everyone. Section 123 deals with unpublished records; this section deals with communications made in official confidence.

1. 'No public officer shall be compelled to disclose'.—The term 'public officer' means an officer with public, as opposed to private, duties who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. The word 'disclose' means the first disclosure of communications made in official confidence and does not apply to a disclosure in a Court of law of what has already been disclosed outside it. The object of the section is to prevent the disclosure of things not known outside that circle which is in confidence and the section has no application when once there has been disclosure to a member of the public to whom the contents of such papers have not been made known in confidence.³

The Vice-Chancellor of the Punjab University is a 'public officer' within the meaning of this section.⁴

2. 'Communications made to him in official confidence'.—The question that arises under this section is whether the communication in question was made to the public officer in official confidence. This is a condition precedent to the claim, and the question is to be primarily decided by the Court before whom the privilege is claimed. There is no clear-cut rule of procedure as to when and how the privilege should be claimed. It should be claimed at the earliest opportunity by the public officer concerned when in reply to the summons he produces the document in his control or charge.⁵ Communications in official confidence import no special degree of secrecy and no pledge or direction for its maintenance, but include generally all matters communicated by one officer to another in the performance of their duties. The question whether such communication was made in the course of such performance is for the Court to decide.⁶ A demi-official letter addressed by one officer by name to another officer by name in view of the reasons for which demi-official letters are usually written is written in official confidence within the meaning of this section.⁷ If communications are not made in official confidence, they cannot be regarded as

¹ *Pandit Chandra Dhar Tewari v. The Deputy Commissioner, Lucknow*, (1938) 14 Luck. 351.

² Taylor, 12th Edn., s. 941, p. 597.

³ *Pandit Chandra Dhar Tewari v. The Deputy Commissioner, Lucknow*, sup.

⁴ *The University of the Punjab, Lahore v. Jaswant Rai*, (1945) 27 Lah.

561.

⁵ *Bhalchandra v. Chambasappa*, (1938) 41 Bom. L. R. 391.

⁶ *Nagaraja Pillai v. The Secretary of State*, (1914) 39 Mad. 304, 311.

⁷ *Pandit Chandra Dhar Tewari v. The Deputy Commissioner, Lucknow*, sup.

privileged, e.g., statements made to a station-master of a railway in the course of an inquiry of a theft by some railway employees.¹

A Government Resolution, containing opinions of Government officers, including a legal adviser, is a privileged document within the meaning of this section.² A statement made to the Collector by a person applying to have his estate taken under the Court of Wards setting forth his financial position, that is to say, the details of his property and liabilities, is a communication made to a public officer in official confidence within the meaning of this section and cannot be used as acknowledgment of any liability mentioned therein.³

3. 'When he considers that the public interests would suffer by the disclosure'.—The sole judge as to whether disclosure will harm the public interest is the public officer concerned and it is not for the Court to decide whether public interests would or would not suffer.⁴ The public officer claiming privilege has to exercise his own discretion in giving or refusing disclosure.⁵

125. No Magistrate or Police-officer shall be compelled to say
Information as to
 commission of offences. whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation.—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.

COMMENT.—Principle.—On grounds of public policy, a Magistrate or a police-officer⁶ cannot be compelled to give the source of information received by him as to the commission of an offence. Similarly, a revenue-officer cannot be compelled to say whence he got information as to any offence against the public revenue. Such officer may, if he likes, disclose the name of the informant. It is of importance to the public for the detection of crimes that those persons who are the channel by means of which the detection is made should not be unnecessarily disclosed.

The accused is not entitled to elicit from individual prosecution witnesses whether he was a spy or an informer, or to discover from police officials the names of persons from whom they had received information; but a detective cannot refuse, on grounds of public policy, to answer a question as to where he was secreted.⁷

Although this section does not in express terms prohibit a witness, if he be willing, from saying whence he got his information, the protection afforded by this section does not depend upon a claim or privilege being made, but it is the duty of the Court, apart from objection taken, to exclude such evidence. If objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witnesses.⁸

¹ *King-Emperor v. Bhagwati Prasad*, (1929) 5 Luck. 297.

² *Sursingji Dajiraj v. Secretary of State*, (1926) 28 Bom. L. R. 1213.

³ *The Collector of Jaunpur v. Jamna Prasad*, (1922) 44 All. 360.

⁴ *Nagaraja Pillai v. The Secretary of State*, (1914) 39 Mad. 304; *Pandit Chandra Dhar Tewari v. The Deputy Commissioner, Lucknow*, (1938)

14 Luck. 351.

⁵ *Jehangir v. Secretary of State*, (1903) 6 Bom. L. R. 131; *King-Emperor v. Bhagwati Prasad*, (1929) 5 Luck. 297.

⁶ *Emperor v. Bilal Mahomed*, (1940) 42 Bom. L. R. 787, [1940] Bom. 768.

⁷ *Anwita Lal Hazra v. Emperor*, (1915) 42 Cal. 957.

⁸ *Weston v. Peary Mohan Doss*, (1912) 40 Cal. 898, 920.

126. No barrister, attorney, pleader or vakil shall at any time¹ be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister,¹ pleader, attorney or vakil,² by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Professional communications.

Provided that nothing in this section shall protect from disclosure —

(1) any such communication made in furtherance of any illegal purpose :

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS.

(a) A, a client, says to B, an attorney—"I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

COMMENT.—*Principle.*—This section is based upon the principle that if communications to a legal adviser were not privileged, a man would be deterred from fully disclosing his case, so as to obtain proper professional aid in a matter in which he is likely to be thrown into litigation.

Under this section no barrister, attorney, pleader or vakil shall at any time be permitted to

(1) disclose (i) any communication made to him by or on behalf of his client or (ii) any advice given by him to his client

in the course and for the purpose of his employment ;

(2) to state the contents or condition of any document with which he has become acquainted

in the course and for the purpose of his employment.

The section does not protect from disclosure—

- (1) any communication made in furtherance of any illegal purpose ;
- (2) any fact observed in the course of employment showing that any crime or fraud has been committed since the commencement of the employment. Under s. 127 the above provisions apply to interpreters and the clerks or servants of barristers, pleaders, attorneys and vakils.

The section not only protects the legal adviser from disclosing communications made to him by his client when interrogated as a witness, but he is not permitted to do so even if he is willing to give evidence unless with the express consent of his client.

Scope.—Sections 126 to 129 deal with the privilege that is attached to professional communications between the legal adviser and the client. Sections 126 and 128 mention the circumstances under which the legal adviser can give evidence of such professional communications. Section 127 provides that interpreters, clerks or servants of legal advisers are restrained similarly. Section 129 says when a legal adviser can be compelled to disclose the confidential communication which has taken place between him and his client.

The protection afforded under this section cannot be availed of against an order to produce documents under s. 94 of the Criminal Procedure Code. The documents must be produced, and then, under s. 162 of this Act, it will be for the Court, after inspection of the documents if it deems fit, to consider and decide any objections regarding their production or admissibility.¹

1. 'At any time'.—These words indicate that the legal adviser is not to disclose the communication even when the relation is ended or even after the client's death. The rule is "once privileged always privileged." The explanation to the section clearly shows this.

2. 'To disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, etc.'—Communications protected by the section must be confidential. The word 'disclose' shows that the privileged communication must be of a confidential or private nature.² It is not every communication made by a person to his legal adviser that is privileged from disclosure. The privilege extends only to communications made to him confidentially, and with a view to obtaining professional advice.³ Illustration (a) exemplifies this. The section applies as much to what a witness has learned by observation, e.g., by watching a manufacturing process being carried on, as to what is communicated to him by word of mouth or writing.⁴

The section protects from publicity not merely the details of the business, but also its general purport, unless it be known *alimunde* that such business falls within proviso 1 or 2. A solicitor is not at liberty to disclose the nature of his professional employment.⁵ If an attorney discloses the facts which came to his knowledge while he was engaged as an attorney, he will be guilty of professional

¹ *Ganga Ram v. Habib-Ullah*, (1935) 58 All. 364.

² *Framji Bhicaji v. Mohansingh Dhansing*, (1893) 18 Bom. 263, 272; *Memon Hajeer Haroon Mahomed v. Molvi Abdul Karim and Moola Ahmed Moola Abdulla*, (1878) 3 Bom. 91; *Emperor v. Rodrigues*, (1903) 5 Bom. L. R. 122; *Kalikumar Pal v. Rajkumar*

Pal, (1931) 58 Cal. 1379.

³ *Framji Bhicaji v. Mohansingh Dhansing*, (1893) 18 Bom. 263; *Emperor v. Bala*, (1902) 4 Bom. L. R. 460.

⁴ *Gopi Lal v. Lakhpat Rai*, (1918) 41 All. 125.

⁵ *Framji Bhicaji v. Mohansingh Dhansing*, sup.

misconduct.¹ The privilege in respect of disclosure of communications between a solicitor and a prospective client extends to the case where the offered retainer is not accepted.²

There is no privilege to communications made before the creation of relationship of pleader and client. Where two persons have a dispute about a claim made by one of them upon the other, and both seek the help of a pleader, and one of them makes a statement to the pleader, the statement so made to the pleader by one of the parties is admissible in evidence. If the communication or admission be made by the plaintiff to the witness in the character of his own exclusive pleader or legal adviser, the bond of secrecy is upon the witness; if not, the communication is not privileged.³

3. 'State the contents....of any document with which he has become acquainted in the course....of his professional employment.'—A legal adviser is not bound to produce or to answer any questions concerning the nature or contents of a document entrusted to him professionally by his client. The Court has no power to order production of such a document.⁴ A pleader is not bound to disclose, at the instance of a third party, the contents of a will that came to his hands in the course of his professional employment even if it is subsequently lost.⁵

Mukhtear.—The restrictions imposed by this section extend also to communications made to Mukhtears when acting as pleaders for their clients.⁶

Proviso 1.—This proviso differs from the English law. Under it any communication made in furtherance of an "illegal purpose" is not privileged. Under the English law the purpose must be 'criminal' and not merely 'illegal.'

The existence of an illegal purpose would prevent any privilege attaching to any communication. Illustration (b) exemplifies this.

Proviso 2.—"No private obligation can dispense with that universal one which lies on every member of society to disclose every design, which may be formed contrary to the laws of society, to destroy the public welfare." Thus, the privilege cannot be claimed where the consultation with the attorney was for the purpose of raising money on a forged will.⁸

Communications made with a view to carry out a fraud are not privileged.⁹

CASES.—At an interview between a solicitor and a client, the solicitor took down a certain statement made by a person named A B, who was in his client's company, and whose name was communicated to him in the course and for the purpose of his professional employment. A B was afterwards tried for defamation. At the trial, the solicitor was called as a witness for the prosecution, and was asked (a) the name of his client, (b) the name of the person who accompanied the client and made a statement to him, and (c) the matter in which his client employed him. The solicitor declined to answer all the three questions on the

¹ *In re An Attorney*, (1924) 26 Bom. L. R. 887, F.B.

² *Minter v. Priest*, [1929] 1 K. B. 655.

³ *Kalikumar Pal v. Rajkumar Pal*, (1931) 58 Cal. 1379.

⁴ *Vishnu v. New York Ins. Co.*, (1905) 7 Bom. L. R. 709.

⁵ *Bai Kanta v. Bhailal*, (1929) 31 Bom. L. R. 1046.

⁶ *Abbas Peada v. Queen-Empress*, (1898) 25 Cal. 736.

⁷ *J. Annesley v. Richard Earl of Anglesea*, (1743) 17 How. St. Tr. 1139, 1240.

⁸ *Regina v. Avery*, (1838) 8 C. & P. 596.

⁹ *O'Rourke v. Darbishire*, [1920] A. C. 581.

ground of privilege. It was held that the solicitor was bound to disclose the name of the client; that he was bound to disclose the name of the person who accompanied the client and made a statement to him; and that he was not bound to disclose the matter in which the client employed him.¹

Where defendants at an interview; at which the plaintiff was present, admitted their partnership to their attorney who was then also acting as attorney for the plaintiff, it was held that the attorney was not precluded by this section from giving evidence of his admission to him : first, because the defendants' statements, having been made in the presence and hearing of the plaintiff, could not be regarded as confidential or private; secondly because those statements did not appear to have been made to the attorney exclusively in his character of attorney for the defendants but to have been addressed to him also as attorney for the plaintiff.²

Section 126 to apply to interpreters, etc.

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

COMMENT.—This section extends the privilege given by s. 126 to interpreters, clerks, or servants of lawyers. It extends to a communication made to a pleader's clerk the same confidential character that attaches to a communication to the pleader direct under s. 126.³

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege not waived by volunteering evidence.

COMMENT.—The privilege belongs to the client and therefore he alone can waive it. The privilege is not lost by calling the legal adviser as a witness, unless the party having the privilege questions him.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled¹ to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Confidential communications with legal advisers.

COMMENT.—Scope.—Sections 126, 127 and 128 prevent a legal adviser or his clerk, servant, etc. from disclosing professional communications. This section applies where the client is interrogated, and whether he be a party to the suit or not. If a party becomes a witness of his own accord he shall, if the Court requires it, be made to disclose everything necessary to the true comprehension of his testimony.⁴

¹ *Framji Bhicaji v. Mohansingh Dhansing*, (1893) 18 Bom. 263.

² *Memon Hajee Haroon Mahomed v. Molvi Abdul Karim and Moola Ahmed Moola Abdulla*, (1878) 3 Bom. 91.

³ *Kameshwar Pershad v. Amanotulla*, (1898) 26 Cal. 53.

⁴ See *Munchershaw Bezoni v. The New Dhurumsey S. & W. Company*, (1880) 4 Bom. 576, 581.

1. 'Compelled.'—This word does not mean subpoenaed. The section uses the words 'compelled to disclose' with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness-box.¹

CASES.—Letters written by one of the defendant's servants to another, for the purpose of obtaining information with a view to possible future litigation, are not privileged, even though they might, under the circumstances, be required for the use of the defendant's solicitor. In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor.² Reports made by defendant's servants to the defendant regarding the subject-matter of the suit are not privileged.³

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him,¹ unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of title-deed of witness, not a party.

COMMENT.—Principle.—This section is based on the principle that great inconvenience and mischief would result to witnesses if they are compelled to disclose their titles by the production of their title-deeds. The object of the privilege is that the title may not be disclosed and examined.

The section protects a witness, who is not a party to the suit in which he is called, from producing—

- (1) title-deeds to any property,
- (2) any document in virtue of which he holds any property as pledgee or mortgagee, or
- (3) any document the production of which might tend to criminate him, unless he has agreed in writing to produce such document.

It would be entirely optional for the witness to produce his title-deeds, and to raise any objection whatever.

English law.—The privilege conferred by this section is more extensive than in England. For in England, where a title-deed is partly set out or where there is reason to suspect fraud, the production of title-deeds is ordered.⁴ In England a witness who is justified in refusing to produce title-deeds cannot be compelled to give parole evidence of their contents.

1. 'Any document the production of which might tend to criminate him.'—A book of account cannot be withheld on the ground that it tends to incriminate him. The mere circumstance that the production of a document may render the witness liable to a civil action does not come within this section.

131. No one shall be compelled¹ to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Production of documents which another person, having possession, could refuse to produce.

¹ *Moher Sheikh v. Queen-Empress*, (1893) 21 Cal. 392, 400.

² *Bippro Doss Dey v. Secretary of State for India in Council*, (1885) 11 al. 655.

³ *Central India Spinning &c. Co. v. G. I. P. Railway*, (1926) 29 Bom. L. R. 414.

⁴ Stokes, Vol. II, p. 831.

COMMENT.—Persons in possession of documents on behalf of others are generally agents, attorneys, mortgagees, trustees, etc. This section extends to these persons the same protection which the preceding section provides for a witness who is not a party to a suit.

It is not open to a litigant to refrain from producing a document which he considers to be irrelevant and if the opposing litigant is dissatisfied he may apply for its production and inspection. If he fails to do so, neither he nor the Court at his suggestion is entitled to draw any inference as to its contents.¹

1. 'Compelled'.—The use of this word indicates that the person in possession of the document will be "*allowed*" to produce documents which other persons would be entitled to refuse to produce if such were in their possession. This is in accordance with English law. It would seem to follow that, although a barrister, pleader, attorney, or vakil is forbidden (by s. 126) to state the contents of any documents with which he has become acquainted in the course and for the purpose of his professional employment, he will be permitted to produce the document itself, if it happen to be in his possession and he choose to do so."²

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue¹ in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind :

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

COMMENT.—**Principle.**—Under this section a witness is not excused from answering any question relevant to the matter in issue on the ground that answer to such question may criminate him or expose him to a penalty or forfeiture.

English law.—Under the English law a witness has the privilege of refusing to answer a question upon the ground that the answer may criminate him. This section substitutes the qualified protection that the answer shall not be used against him.

1. 'Any question as to any matter relevant to the matter in issue.'—The section does not in terms deal with all criminatory questions which may be addressed to a witness, but only with questions as to matters relevant to the matter in issue. Irrelevant questions should not be allowed, and it may be implied from the limitation in this section that a witness should be excused from answering questions tending to criminate as to matters which are irrelevant.³ A witness who answers a question or questions put to him by counsel without seeking the protection of this section is not entitled to that protection.⁴

¹ *Chandra Narayan Deo v. Ram-chandra*, (1945) 24 Pat. 541.

² See Field, 8th Edn., p. 803.

³ *The Queen v. Gopal Doss*, (1881)

3 Mad. 271, 277, 278, F.B.

⁴ *Peddabba Reddi v. Varada Reddi*, (1928) 52 Mad. 432.

Proviso.—The section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give.¹ The mere subpoenaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words “shall be compelled to give” in the proviso apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question.² The Allahabad High Court has held that this is too narrow an interpretation. A common sense meaning should be given to the word ‘compelled.’ It is impossible to deny that in the case of ordinary laymen unacquainted with the technical terms of this section, they are compelled to answer on oath questions put either by the Court or by the counsel, especially when the question is relevant to the case. An answer given by a witness under such circumstances is protected by this section. Whether or not a witness is ‘compelled’ within the meaning of this section to answer any particular question put to him while in the witness-box is in each case a question of fact.³

The Calcutta High Court has held that a witness who makes a voluntary and irrelevant statement not elicited by any question put to him while under examination is not protected by this section. It has, therefore, held that a witness making a voluntary and irrelevant statement to injure the reputation of another is guilty of defamation.⁴

According to an earlier decision of the Madras High Court a witness is not guilty of defamation for any statements made in the witness-box.⁵ But subsequently it has held that a witness who answers a question put to him by counsel without seeking the protection of this section is not entitled to any protection as the statements made by him are entitled not to an absolute but only to a qualified privilege.⁶

The Bombay High Court has in a full bench case laid down that relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding are not protected by this proviso where the witness has not objected to answering the questions put to him.⁷ A witness who makes defamatory statements in a witness box comes within the purview of s. 499, Indian Penal Code.⁸

The Nagpur High Court has held that there is no essential difference between this section and s. 161 (2), Criminal Procedure Code. Section 161 (2) does not go further than this section.⁹

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated

Accomplice.

¹ *Queen-Empress v. Ganu Sonba*, (1888) 12 Bom. 440; *The Queen v. Gopal Doss*, (1881) 3 Mad. 271, F.B.; *Queen-Empress v. Moss*, (1893) 16 All. 88; *Kallu v. Sital*, (1918) 40 All. 271; *Emperor v. Pramath Naik Bose*, (1910) 37 Cal. 878; *Jagannath v. King-Emperor*, (1934) 10 Luck. 169; *Rasul Bhai v. Lall Khan*, [1939] Ran. 479.
² *Moher Sheikh v. Queen-Empress*, (1893) 21 Cal. 392.
³ *Emperor v. Banarsi*, (1923) 46 All. 254; *Emperor v. Chatur Singh*,

(1920) 43 All. 92; *Emperor v. Ganga Sahai*, (1920) 42 All. 257.

⁴ *Haidar Ali v. Abru Mia*, (1905) 32 Cal. 756.

⁵ *Manjaya v. Sesha Setti*, (1888) 11 Mad. 477.

⁶ *Peddabba Reddi v. Varada Reddi*, (1923) 52 Mad. 432.

⁷ *Bai Shanta v. Umrao Amir*, (1925) 28 Bom. L. R. 1, 50 Bom. 102, F.B.

⁸ *Ibid.*

⁹ *Hittu v. Sheolal*, [1947] Nag. 899.

testimony of an accomplice.

COMMENT.—Principle.—The evidence of an accomplice, though it is uncorroborated, may form the basis for a conviction.

This section is the only absolute rule of law as regards the evidence of an accomplice. But illustration (b) to s. 114 is a rule of guidance to which the Court also should have regard. It is, however, not a hard-and-fast presumption, incapable of rebuttal, a *presumptio juris et de jure*.¹

The Court may consider, though it is not bound to consider, an accomplice unworthy of credit unless he is corroborated in material particulars. The evidence of an accomplice requires to be accepted with a great deal of caution and scrutiny because

- (a) he has a motive to shift guilt from himself;
- (b) he is an immoral person likely to commit perjury on occasion;
- (c) he hopes for pardon or has secured it, and so favours the prosecution.²

An 'accomplice' is a person who has concurred in the commission of an offence. He is a guilty associate³ in crime or partner⁴. Spies are not accomplices. A person who makes himself an agent for the prosecution with the purpose of disclosing and discovering the commission of an offence, either before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy, whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.⁵ A witness, who assisted the criminals to the extent of keeping a look out to see whether the police were approaching, is in the position of an accomplice.⁶ A witness who is not a guilty associate in crime or who does not sustain such a relation to the criminal act that he could be jointly indicted with the principal is not an accomplice as the element of *mens rea* is entirely absent. A witness who only happens to be conversant of a crime or who makes no attempt to prevent it or who does not disclose it is not an accomplice and the rule of practice as to corroboration does not apply to his evidence.⁷ A detective who supplies marked money for being used as bets to detect gambling is not an accomplice, and his evidence, though its value depends on his character, does not require corroboration.⁸

The Privy Council has laid down in *Mahadeo v. King*,⁹ which is a decision on appeal from Fiji Islands, where the English law of evidence is in force, that the evidence of an accessory must be corroborated in some material particular

¹ *Emperor v. Shrinivas*, (1905) 7 Bom. L. R. 969.

² *Barkat Ali v. The Crown*, (1916) P. R. No. 2 of 1917 (Cr.).

³ *Ramaswami Goundan v. Emperor*, (1903) 27 Mad. 271; Wharton, 14th Edn., p. 13.

⁴ *Jagannath alias Khairadi v. King-Emperor*, (1941) 17 Luck. 516.

⁵ *Emperor v. Chaturbhuj Sahu*, (1910) 38 Cal. 96; *Queen-Empress v. Bastin*, (1897) P. J. L. B. 365; *Queen-*

Empress v. Nga Swe, (1898) 1 U. B. R. (1897-1901) 176.

⁶ *Dhanapati De v. Emperor*, [1944] 2 Cal. 312.

⁷ *Ghudo v. King-Emperor*, [1945] Nag. 315.

⁸ *Govinda v. Crown*, [1937] Nag. 181; *Queen-Empress v. Jawcharam*, (1894) 19 Bom. 363.

⁹ (1936) 38 Bom. L. R. 1101, P.C., followed in *Surajpalsingh v. Crown*, [1938] Nag. 516.

not only bearing upon the facts of the crime but upon the accused's implication in it. Evidence of one accomplice is not available as corroboration of another. It further holds that this rule of corroboration, which was a long rule of practice, is now virtually a rule of law. The majority of the decisions of the Bombay,¹ the Calcutta² and the Lahore High Courts,³ and the Chief Court of Oudh,⁴ and a full bench decision of the Madras High Court,⁵ have taken the same view. The Allahabad, the Patna, the Rangoon and the Nagpur High Courts have taken a different view.

✓ The Madras High Court has held in a full bench case that an approver's evidence is admissible, and, if accepted, is sufficient to support a conviction, but whether it should be accepted is a different matter. Unless the case is a very exceptional one, an accomplice's evidence should not be accepted as being sufficient.⁶ The evidence of an approver implicating other accused persons as parties to a crime can be acted upon when it is corroborated by confessions made by some of the co-accused, though such confessions of the co-accused and the evidence of the approver vary in some respects, as is to be expected in such cases, where each of them tries to minimize his own share in the crime.⁷ Recently the Madras High Court has held that this section states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Under the English common law the same rule applies, but both in England and in India it has become a rule of practice, and it is now virtually a rule of law, that corroboration is required. It is also an accepted rule that one accomplice cannot corroborate another; but s. 30 says that, when more persons than one are being tried jointly for the same offence, and a confession made by one affecting himself and some of the others is proved, the Court may "take into consideration" the confession as against the others as well as against the person who makes the confession. There is no corresponding provision in English law.⁸

The Allahabad High Court has held that although, as a general rule, it would be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice, such evidence must, like that of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which

¹ *Queen-Empress v. Maganlal and Motilal*, (1889) 14 Bom. 115, 119; *Queen-Empress v. Chagan Dayaram*, (1890) 14 Bom. 331.

² *Emperor v. Lalit Mohan Chuckerbutty*, (1911) 38 Cal. 559, s.b.; *Ambica Charan Roy v. The Emperor*, (1931) 35 C. W. N. 1270, s.b.; *Bimalkrishna Biswas v. Emperor*, (1935) 62 Cal. 819, contra, *Nirmaljeeban Ghosh v. Emperor*, (1934) 62 Cal. 238, followed in *Purnananda Das Gupta v. Emperor*, [1939] 1 Cal. 1.

³ *Sher Singh v. The Crown*, (1932) 14 Lah. 111; *Kartar Singh v. The Crown*, (1935) 17 Lah. 518; *Nikka v. The Crown*, (1936) 17 Lah. 541.

⁴ *Baboo Singh v. King-Emperor*, (1935) 11 Luck. 662; *Beni Madho v. King-Emperor*, (1933) 9 Luck. 22; *Gaya Prasad v. King-Emperor*, (1931)

6 Luck. 658; *Lale v. King-Emperor*, (1929) 5 Luck. 101, contra, *Jagannath alias Khairati v. King-Emperor*, (1941) 17 Luck. 516.

⁵ *Rajagopal*, [1944] Mad. 308, F.B. The following cases are not referred to in the full bench case and they laid down that an accomplice need not be corroborated in material particulars before it can be acted upon, and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true: *King-Emperor v. Nilakanta*, (1912) 35 Mad. 247, s.b.; *Muthukumaraswami Pillai v. King-Emperor*, (1912) 35 Mad. 397, F.B.

⁶ *Rajagopal*, sup.

⁷ *Ibid.*

⁸ *Thiagaraja Bhagavathar*, In re, [1946] Mad. 389.

the accomplice at the time of giving his evidence may stand, and the motives which he may have for stating what is false. If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence of the accomplice, although uncorroborated, is true, and the evidence, if believed, establishes the guilt of the accused, it is his duty to convict.¹ In an earlier case it held that there must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him.²

The Patna High Court has held that the evidence of an accomplice is regarded *ab initio* as open to grave suspicion. Accordingly, (i) if the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon unless corroborated in some material particular, and (ii) if the suspicion attaching to the accomplice's evidence be removed, then that evidence may be acted upon even though uncorroborated, and the guilt of the accused may be established upon that evidence alone.³

The decisions of the Allahabad and the Patna High Courts are prior to the ruling of the Privy Council in *Mahadeo's* case. But even after the Privy Council ruling the Nagpur and the Rangoon High Courts have held that it is open to a Court to depart from the presumption in s. 114 (b) if it thinks there are special circumstances in the case making it safe to do so, and a conviction is not illegal merely because it is based on the uncorroborated testimony of an accomplice.⁴ What has been said of accomplices applies to approvers.⁵ The Nagpur High Court has further held that, in the absence of a specific provision in the Evidence Act, it must now be taken as settled, in view of *Mahadeo's* case, that the evidence of one accomplice cannot be used as independent evidence to corroborate the evidence of another accomplice.⁶

The Nagpur High Court has held that a person who as a spy or a detective associates with criminals solely for the purposes of discovering and making known their crimes, without any criminal interest and has made himself an agent for the prosecution before associating with the wrong-doers or before the actual perpetration of the offence is not an accomplice even though he encourages or aids in the commission of crime. He is however an accomplice if he extends no aid to the prosecution until after the offence has been committed.⁷

Nature of corroboration required.—The corroboration to the evidence of an accomplice, when required, should be such corroboration in material particular as would induce a prudent man on the consideration of all the circumstances to believe that the evidence is true not only as the narrative of the offence committed but also so far as it affects each person thereby implicated.⁸ All that is necessary is to see that the testimony has been corroborated in some material particular,

¹ *Queen-Empress v. Gobardhan*, (1887) 9 All. 528.

² *Queen-Empress v. Ram Saran*, (1885) 8 All. 306.

³ *Rattan Dhanuk v. King-Emperor*, (1928) 8 Pat. 235; *Nanhak Ahir v. King-Emperor*, (1934) 13 Pat. 529.

⁴ *Surajpalsingh v. Crown*, [1938] Nag. 516; *The King v. Nga Myo*, [1938] Ran. 190, 210, F.B.

⁵ *Ibid.*, p. 211.

⁶ *Surajpalsingh v. Crown*, [1938] Nag. 516, 527.

⁷ *Mohanlal v. King-Emperor*, [1946] Nag. 982.

⁸ *Emperor v. Shrinivas*, (1905) 7 Bom. L. R. 969; *Reg. v. Budhu Nanhu*, (1876) 1 Bom. 475; *Emperor v. Gangapa*, (1913) 15 Bom. L. R. 975, 38 Bom. 156; *Emperor v. Govind Balvant Laghate*, (1916) 18 Bom. L. R. 266; *Emperor v. Sabitkhan*, (1919) 21 Bom. L. R. 448, 43 Bom. 739, and *Emperor v. Jehangir Cama*, (1927) 29 Bom. L. R. 996, 1007, no longer of any authority in view of *Mahadeo's* case.

which tends to show that the accused was connected with the main crime with which he has been charged. The corroboration need not consist of evidence which, standing alone, would be sufficient to justify the conviction of the accused. If that were the law, it would be unnecessary to examine an approver. All that seems to be required is that the corroboration should be sufficient to afford some sort of independent evidence to show that the approver is speaking the truth with regard to the accused person whom he seeks to implicate.¹ The law does not require that every detail of the approver's story must be fortified by a similar story told by an independent witness; the effect of any such principle would be to rule out the accomplice's evidence as altogether inadmissible. It is only necessary that the accomplice's evidence should, in the circumstances of each particular case, receive that corroboration which it seems to require.² Evidence that the accused were, at the time the crime was committed, near the scene of the crime and so placed as to justify the inference that they were accompanying persons whose complicity in the crime has been satisfactorily proved by independent evidence, is sufficient corroboration of the testimony of an accomplice.³ Where a person is only an accomplice by implication or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is an actual participator with the principal offender.⁴ The rule that evidence of an accomplice should receive corroboration in material particulars applies to the evidence of an accused who is convicted and sentenced on his own plea and who then appears as a witness against his co-accused.⁵

Bribery.—The rule requiring corroboration of the evidence of an accomplice applies with very little force where the accused is charged with the offence of extorting bribe, and the accomplice is not a willing participant in the offence but a victim of that offence.⁶ Persons coming technically within the category of accomplices cannot be treated as on precisely the same footing.⁷ In a case of bribery where the person who pays the bribe is not a willing participant in the offence but is really a victim of that offence, conviction of the accused may be based on the evidence of the person paying the bribe if there is a slight independent corroboration of his evidence.⁸

Identity.—It is the invariable practice of the Courts to require the corroboration by an independent witness of so much of the evidence of an accomplice as goes to identify the accused person as the offender.⁹ Such corroboration ought to be that which is derived from unimpeachable or independent evidence.¹⁰

¹ *Bishnu Pada Chatterji v. Emperor*, [1944] 2 Cal. 327.

² *Queen-Emp. v. Ningappa*, (1900) 2 Bom. L. R. 610; *Emperor v. Bhimrao*, (1924) 27 Bom. L. R. 120; *Emperor v. Kuberappa*, (1912) 15 Bom. L. R. 288; *Emperor v. Shankarshet Urvane*, (1933) 35 Bom. L. R. 1040, 58 Bom. 40; *Satyannarayana*, (1943) 22 Pat. 681.

³ *Dhanapati De v. Emperor*, [1944] 2 Cal. 312.

⁴ *Kamala Prasad v. Sital Prasad*, (1901) 28 Cal. 339; *Banu Singh v. Emperor*, (1906) 33 Cal. 1353.

⁵ *Emperor v. Allisab*, (1932) 34 Bom. L. R. 1453.

⁶ *Emperor v. Papa Kamalkhan*, (1935) 37 Bom. L. R. 366, 59 Bom. 486; *Deo Nandan Pershad v. Emperor*, (1906) 33 Cal. 649.

⁷ *King-Emp. v. Malhar*, (1901) 3 Bom. L. R. 694, 26 Bom. 193; *Kamala Prasad v. Sital Prasad*, sup.; *Banu Singh v. Emperor*, (1906) 33 Cal. 1353.

⁸ *Narayan Prashad v. King-Emperor*, [1948] Nag. 276.

⁹ *Emperor v. Kostalkhan*, (1902) 4 Bom. L. R. 431; *Queen-Empress v. Krishnabhat*, (1885) 10 Bom. 319.

¹⁰ *Emperor v. Baji Krishna*, (1904) 6 Bom. L. R. 481.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

COMMENT.—Under the Act no particular number of witnesses is required in any case. “The uncorroborated evidence of a single witness, if believed, is therefore sufficient, under this Act, to convict a man of perjury or of an offence against chap. vi of the Penal Code; to authorise a Magistrate to make under the Code of Criminal Procedure, c. 36, an order against the alleged father of a bastard child : to justify a judge in giving a decree in favour of the plaintiff in a suit for breach of promise of marriage, or to establish a claim on the estate of a deceased person.”¹

Under the English law, however, in certain cases two witnesses are necessary, e.g., two witnesses are required in prosecutions for perjury, treason, etc. The Bombay High Court has laid down that in ordinary cases, and where the provisions peculiar to the Indian law do not apply, the rule of English law which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in this country.² The Allahabad High Court has held that in communal riot cases it is unsafe to convict on the evidence of one witness alone, unless there is satisfactory circumstantial evidence in addition.³

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.¹

COMMENT.—This section deals with the order in which witnesses are to be examined; and not with the quantity or quality of the proof.

In civil proceedings the order is to be regulated by the provisions of the Civil Procedure Code; and in criminal proceedings, by those of the Criminal Procedure Code. Failing these, the order is to be determined by the discretion of the Court. In practice, however, it is left largely to the option of the party calling witnesses to examine them in any order he chooses.

Civil proceedings.—In civil suits, it is the plaintiff who generally has the right to begin (Civil Procedure Code, O. XVIII, r. 1). The other party has then to state his case (O. XXVIII, r. 2). If the defendant admits the facts alleged by the plaintiff and relies on a defence, it is for him to establish that defence. The plaintiff may then prove his case in rebuttal if any (O. XVIII, r. 3). Where a party is taken by surprise by a point made against him at the hearing, the Judge may, if he think right, at any stage of the trial, allow him to produce rebutting evidence.⁴ Such evidence must be that which goes to cut down the defence, without being confirmation of the original case.⁵

¹ Stokes, Vol. II, p. 923.

² Per Jenkins, C. J., in *Emperor v. B. G. Tilak*, (1904) 6 Bom. L. R. 324, 339, 28 Bom. 479.

³ *Emperor v. Ujagar*, (1933) 55

All. 639.

⁴ *Bigsby v. Dickinson*, (1876) 4 Ch. D. 24.

⁵ *Rex v. Hilditch*, (1832) 5 C. & P. 299.

In civil appeals, the appellant is heard first in support of his appeal. If the Court does not dismiss the appeal at once, the respondent is heard against the appeal; and in such case the appellant is entitled to reply (O. XII, r. 16).

Criminal proceedings.—In criminal proceedings, the complainant or the prosecutor, as the case may be, has the right to begin : and, if necessary, the accused is asked to adduce his evidence in defence. The trial before a Magistrate may be (a) in summons cases (Criminal Procedure Code, s. 224), or (b) in warrant cases (ss. 252, 254, 257), or (c) summary (s. 262). A Magistrate may also inquire into cases triable by the Court of Session or High Court (s. 208). Where a trial takes place before a Court of Session, or High Court, the procedure as laid down in ss. 271, 226, 289, 290, 291 and 292 of the Criminal Procedure Code is followed. In hearing appeals, the appellant begins and if necessary the other side is heard next (s. 423).

Commission.—In both civil and criminal proceedings witnesses may be examined on commission, where evidently the same rules will apply respectively (see Civil Procedure Code, O. XXVI, rr. 1-8; Criminal Procedure Code, ss. 503-507). Evidence taken on commission is later put on record of the case.¹

1. 'Discretion of the Court.'—The Court is very slow to interfere with the discretion of counsel as to the order in which witnesses should be examined.² While counsel has discretion, the Court has also the power to direct the order in which witnesses cited by the party shall be examined.³

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant ; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

Judge to decide as to admissibility of evidence.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

ILLUSTRATIONS.

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

¹ *Kusum Kumari Roy v. Satya Ranjan Das*, (1903) 30 Cal. 999; *Man Gobinda Chowdhuri v. Shashindra Chandra Chowdhuri*, (1907) 35 Cal. 28; *Dhanu Ram Mahto v. Murlu Mahto*, (1909) 36 Cal. 566.

² Per Stanley, J., in *Kedar Nath Ghose v. Bhupendra Nath Bose*, (1900) 5 C. W. N. xv.

³ In the goods of *Gopessur Dutt*, (1911) 16 C. W. N. 265.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen. It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C and D is proved, or may require proof of B, C and D before permitting proof of A.

COMMENT.—This section embodies three cardinal rules as to the admissibility of evidence.

Clause 1.—In order to focus the attention of the litigants to the points in dispute between them, issues are raised on the pleadings. The parties are called upon to lead evidence on them. Such evidence must primarily relate to facts in issue; but it may also refer to relevant facts (s. 5). In the latter case, the first paragraph of this section enables the presiding Judge to ask the party to show the relevancy of the fact which is sought to be proved. Questions of admissibility of evidence are to be determined by the Judge.

In dealing with the relevancy of facts as above, two sets of special circumstances may arise: first, where the *evidence of one fact is admissible* only upon proof of some other fact, such last-mentioned fact must be proved first, unless the Court accepts the undertaking by the party that it will be proved later on (cl. 2); and, secondly, where the *relevancy of one fact depends* upon the proof of another fact, the Judge may in his discretion permit either of them to be proved first (cl. 3).

It is the bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case.¹

Clause 2.—This clause should be read with s. 104. Its purpose is to facilitate a party in laying his case before the Court. Where a witness in the box deposes to a story, some portions of which would become admissible only on proof of certain other facts, it is convenient as well as economical in time to permit him to complete his story, as soon as the party calling him gives an assurance that such other facts will be proved by him later on. Illustrations (a) and (b) demonstrate the application of the rule.

Clause 3.—This clause is expressed in wider terms than cl. 2. When the relevancy of one fact depends upon the proof of another fact, the Judge has full discretion to allow either fact to be proved first. The clause is illustrated by illustrations (c) and (d).

Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given.² Where a Judge

¹ *Gurbaksh Singh v. Gurdial Singh*, (1927) 29 Bom. L. R. 1392, P.C.

² *Jadu Rai v. Bhubctaran Nundy*,

(1889) 17 Cal. 173; *Ramjibun Serowgy v. Oghore Nath Chatterjee*, (1897) 25 Cal. 401.

is in doubt as to the admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non-admissibility.¹

137. The examination of a witness by the party who calls him shall
Examination-in-chief. be called his examination-in-chief.

Cross-examination. The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination. The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

COMMENT.—The third para. means, “where a witness has been cross-examined, and is then examined by the party who called him, such subsequent examination shall be called his re-examination.”²

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
Order of examinations.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.
Direction of re-examination.

COMMENT.—The examination of witnesses is *viva voce* (O. XVIII, r. 4). It is always in the form of questions and answers. The deposition is usually taken down in the form of a narrative formed out of the answers (O. XVIII, r. 5). Where a question is objected to and yet allowed by the Court to be put, the question and its answer are taken down *verbatim* (O. XVIII, r. 10). At the end of the deposition, it is read out to the witness and signed by the presiding officer (O. XVIII, r. 5).

The *viva voce* examination consists generally of three stages : first of all, the witness is examined by the party who calls him; this is called examination-in-chief (s. 137). He is next examined by the adverse party; this is called cross-examination (s. 137). Finally he is examined again by the party who called him; this is called re-examination (s. 137).

Section 256 of the Criminal Procedure Code, giving the accused a right in a warrant case to cross-examine the witnesses for the prosecution after a charge has been framed, is an exception to the general rule. In the exercise of the inherent powers of the Court, the Magistrate in an inquiry under Chapter XVIII of the Code of Criminal Procedure may allow the accused to reserve cross-examination for a future occasion in the special circumstances of a case.³

Examination-in-chief.—This will ordinarily be in the form of a connected narrative, brought out by questions put to the witness by the party calling him.

¹ Per Straight, J., in *The Collector of Gorakhpur v. Palakdhari Singh*, (1889) 12 All. 1, 26, F.B.

² Stokes, Vol. II, p. 925.

³ *G. V. Raman v. Emperor*, (1929) 57 Cal. 44.

It must relate to relevant facts [s. 138 (2)]. No leading questions can be asked (s. 142).

"Unless evidence of reputation be admissible, witnesses must, in general, merely speak to facts within their own knowledge, and they will not be permitted....to express their own belief or opinion....Though a witness, in general, must depose to such facts only as are within his own knowledge, the law does not require him to speak with such expression of certainty as to exclude all doubt. For, whatever may be the nature of the subject, if the witness has any personal recollection of the fact under investigation, he may state what he remembers concerning it, and leave the jury to judge of the weight of his testimony. If the impression on his mind be so slight as to justify the belief that it may have been derived from others, or may be some unwarrantable deduction of his own dull understanding or lively imagination, it will be rejected."¹ On some particular subjects, positive and direct testimony may often be unattainable, and, in such cases, a witness is allowed to testify to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, provided these last facts be within his personal knowledge.²

This mode of examination, however, chiefly prevails on questions of *science* or *trade*, where, from the difficulty, and occasional impossibility, of obtaining more direct and positive evidence, persons of skill, sometimes called *experts*, are allowed, not only to testify to facts, but to give their opinions in evidence.³

"On the other hand,...the opinions of skilled witnesses cannot be received when the inquiry relates to a subject which does not require any peculiar habits or course of study to qualify a man to understand it. Thus, evidence is inadmissible to prove that one name, or one trade mark, so nearly resembles another as to be calculated to deceive, or that the make-up of one tin of coffee is so like another as to be calculated to deceive purchasers. Witnesses are not permitted to state their views on matters of moral or legal obligation, or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than another....To put it briefly, a witness may not, on other than scientific subjects, be asked to state his opinion upon a question of fact which is the very issue for the jury, as, for instance, whether a driver is careful; a road dangerous; or an assault or homicide justifiable. Nor may he be asked whether a clause in a contract restricting trade is reasonable or unreasonable, for this is a question for the Judge."⁴

"The opinions of scientific witnesses are admissible in evidence, not only where they rest on the personal observation of the witness himself, and on facts within his own knowledge, but even where they are merely founded on the case as proved by other witnesses at the trial. But here the witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine."⁵

It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. This task is more difficult than may at first sight appear. The timid witness must be encouraged; the talkative witness repressed; the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible.⁶

¹ Taylor, 12th Edn., ss. 1414-15, pp. 898-99.

² *Ibid.*, s. 1416, p. 899.

³ *Ibid.*, s. 1417, p. 900.

⁴ *Ibid.*, s. 1419, pp. 902, 903.

⁵ *Ibid.*, s. 1421, p. 904.

⁶ Powell, 10th Edn., p. 458.

The statements made in examination-in-chief, however, lose much of their credibility and weight, unless they are put into the crucible of cross-examination and emerge unscathed from the test.

Cross-examination.—The testimony of a witness is not legal evidence unless it is subject to cross-examination; and where no opportunity has been given to the appellant's counsel to test the veracity of the principal prosecution witness or where owing to the refractory attitude of the witness the Court is constrained to terminate all of a sudden and prematurely the cross-examination of the witness, the evidence of such a witness is not legal testimony and cannot be the basis of a judicial pronouncement.¹ No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.² "The exercise of this right [cross-examination] is justly regarded as one of the most efficacious tests which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description, are all fully investigated, ascertained, and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a Court or jury, for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which cross-examination may be extended."³

The objects of cross-examination are to impeach the accuracy, credibility, and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party.⁴

When the examination-in-chief has resulted in clear, conclusive, or unimpeachable evidence, it may be prudent for the adverse party not to cross-examine; for, in such a case, he may by so doing, instead of weakening the evidence, merely strengthen and confirm it. So, too, he will generally not cross-examine a witness, whose evidence he admits, or which cannot possibly injure his case. Reckless cross-examination, moreover, often lets in evidence which before was not admissible.⁵

Cross-examination, though a very powerful, is also a very dangerous engine. It is a double-edged weapon, and as often wounds him who wields it, as him at whom it is aimed. To wield it to advantage requires great practice and natural tact. In the hands of the raw and inexperienced advocate, we frequently see it do more injury than good to his cause. Yet it is in this branch of forensic practice that the youthful advocate is most eager for display. The old and wary pleader remembers that the witness is hostile to him, and is perhaps on the watch to inflict damage on his cause. Every question is likely to give such a witness an opportunity of clinching the nail he has driven before, if not of starting new matter, which the examination-in-chief may not have elicited, but which may be further pursued on re-examination. Therefore unless there is some very good ground for believing that the witness can be broken down, or convicted of falsehood, it is rarely good

¹ *Ram Kumar v. King-Emperor*, (1936) 12 Luck. 553.

² *Maganlal v. King-Emperor*, [1946] Nag. 126.

³ Taylor, 12th Edn., s. 1428, p. 910.

⁴ Powell, 10th Edn., p. 463.

⁵ *Ibid.*

policy to submit him to a severe cross-examination. Sometimes a cross-examination is little more than affectation, in order that the pleader may not seem to let the witness go without question, as if he were totally impregnable : and a few questions are asked to shake his credit, or show the weakness of his memory. Sometimes too, a cross-examination may have the fishing object of eliciting some haphazard reply, which will open up matter favourable to the examiner on further pursuit. But generally speaking, cross-examination is to be warily approached, and the way carefully felt. Its use should be sparing; yet in mofussil practice the cross-examinations are scarcely less remarkable for their length than the utter irrelevancy and futility of their character.¹

The trend of the cross-examination is in most cases determined by the line of narrative unfolded in the examination-in-chief. It is usual to take each important item so deposed to and to cross-examine the witness upon it. Its purpose is two-fold. First of all, the cross-examiner tries to discover if the story told by the witness-in-chief is tainted by exaggerations or falsehoods. Secondly, the adverse party can in some cases construct his line of defence from out of the mouth of the witness.

The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favourable to his cause, or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood.²

In England and in Ireland "cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case, and, therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence. So far has this doctrine been carried that, even where it was requisite that the substantial, though not the nominal, party in the cause should be called by his adversary for the sake of formal proof only, it was held that he was thereby made a witness for all purposes, and may be cross-examined as to the whole case."³

A skilful cross-examination is the highest attainment of an advocate's art. It is difficult to frame any rules governing it; as its technique can be acquired only by natural instincts or by long practice. The Act has, however, laid down some rules of guidance.

Like examination-in-chief, cross-examination must 'relate to relevant facts' : but unlike re-examination, it need not be confined to facts deposed to in the preceding examination (s. 138). Further, it differs from both of them, inasmuch as leading questions can be asked (ss. 142, 143).

No cross-examination can be allowed of a witness who is "summoned to produce a document" (s. 139), but it is competent of a witness to character (s. 140). Similarly, a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question without such writing being shown to him or being proved (s. 145).

The range of cross-examination is unlimited, the only circumscribing limits being that it must 'relate to relevant facts' (s. 138).

¹ Norton on Evidence, 3rd Edn., s. 418, p. 222.

Kasheerath Doss, (1866) 6 W. R. (Civil) 181, 182.

² *Meer Sujad Ali Khan Nawab Zoofukar Dowla Bahadoor v. Lalla* L. E.—18.

³ Taylor, 12th Edn., s. 1432, p. 914.

By ss. 146 to 150 the Legislature has tried to give very wide powers to the cross-examiner to help him in finding out the truth in oral depositions laid out before the Court. But the Legislature protects the witness (i) from consequences which he might incur from speaking the truth; and (ii) from needless questions, for the cross-examiner has to see that the imputations he makes against the witness are well-founded.

In the course of cross-examination, a witness may be asked questions

- (1) to test his veracity;
- (2) to discover who he is and what is his position in life;
- (3) to shake his credit by injuring his character, although his answer might criminate him or expose him to penalty or forfeiture (s. 146).

The cross-examiner is treading on safe ground so far as (1) and (2) are concerned. As regards (3), complex set of considerations present themselves. If the questions refer to a relevant matter the provisions of s. 132 are applicable (s. 147). If, however, the questions refer to an irrelevant matter, they are proper—

- (1) if the truth or imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness.

They are improper—

- (1) if the imputation conveyed by them relates to matters so remote in time or of such a character that they would not affect the credibility of the witness;
- (2) if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence (s. 148).

Before such questions are asked, the person putting them must have reasonable grounds for thinking that the imputation was well-founded (s. 149). If any lawyer asks such question without reasonable grounds, the Court may report the case to the High Court or other authority to which he is subject (s. 148).

All questions or inquiries which are indecent or scandalous, unless they relate to facts in issue, are to be avoided (s. 151); so also all questions which are calculated to insult or annoy or couched in needlessly offensive form (s. 152).

Cross-examination is in almost all cases undertaken by the adverse party; but the Court may permit a party to cross-examine his own witness if he proves to be a hostile witness (s. 154).

In criminal cases (warrant cases) tried by Magistrates, the accused person can, after the charge has been framed and he has given his plea, re-call and cross-examine any witness for the prosecution (Criminal Procedure Code, s. 256).

An accused person may cross-examine a witness called by a co-accused for his defence when the case of the second accused is adverse to that of the first.¹

Where the prosecution declines to call in the Court of Session a witness for the Crown who has been examined in the Magistrate's Court, and such witness is thereupon placed in the witness-box by counsel for the defence, the counsel for the defence is not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition are, under the circumstances, only admissible by way of cross-examination, with the permission of the Court, if the witness proves himself a hostile witness.²

¹ *Ram Chand Chatterjee v. Hanif Sheikh*, (1893) 21 Cal. 401.

² *Queen-Empress v. Zawar Husen*, (1897) 20 All. 155.

Where the defences of a co-respondent or a co-defendant and the respondent or the defendant are identical, neither is entitled to cross-examine the other. It is only where the evidence of a co-defendant or a co-respondent is adverse to the defendant or the respondent that the defendant or respondent has the right to cross-examine.¹

Re-examination.—The object of re-examination is to afford the party calling a witness an opportunity of filling in the lacuna or explaining the inconsistencies which the cross-examination has discovered in the examination-in-chief of the witness. It is accordingly limited to the explanation of matters referred to in cross-examination (s. 138). It partakes of the nature of examination-in-chief inasmuch as no leading questions can be asked (s. 142).

The party who calls a witness has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the evidence on the examination-in-chief and that which has been given in cross-examination; or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination.²

In re-examination the party has a right to ask all questions which may be proper to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive, or provocation, which induced the witness to use those expressions, but he has no right to go further, and to introduce matter new in itself, and not suited to explain either the expressions or the motives of the witness.³ If the counsel chooses to cross-examine the witness as to *facts which were not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given.⁴ If a question has been omitted in the examination-in-chief, and cannot, in strictness, be asked on re-examination as not arising out of the cross-examination, it is usual for counsel to request the Judge to make inquiry, and such a request is generally granted.⁵ If the cross-examination is ineffective, no re-examination is, as a rule, made.

Tendering witness for cross-examination.—The practice of tendering witnesses for cross-examination is inconsistent with this section. It ought never to be employed in the case of a witness whose evidence is not merely formal. The practice leads only to confusion and does not induce to the discovery of the truth.⁶

Examination by Court.—It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in this section.⁷

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

Cross-examination of person called to produce a document.

¹ *Ghadiali v. Ghadiali*, (1942) 48 Bom. L. R. 36.

² Powell, 10th Edn., p. 469.

³ Taylor, 12th Edn., s. 1474, p. 939.

⁴ *Ibid.*, s. 1475, p. 940.

⁵ *Ibid.*, s. 1477, p. 942.

⁶ *Emperor v. Kasamalli Mirzalli*, (1941) 44 Bom. L. R. 27, [1942] Bom.

384, F.B.; *Emperor v. Sadeppa Gireppa Mutgi*, (1941) 43 Bom. L. R. 946, [1942] Bom. 115; *Veera Korawan*, In re, (1929) 53 Mad. 69.

⁷ Per Garth, C. J., in *Noor Bux Kari v. The Empress*, (1880) 6 Cal. 279, 283.

COMMENT.—Principle.—A witness summoned merely to produce a document does not become a witness for purposes of cross-examination; since he may either attend the Court personally or may depute any person to produce the document in Court (Civil Procedure Code, O. XVI, r. 6; Criminal Procedure Code, s. 94). If he intentionally omits to produce the document, he commits the offence punishable by s. 175 of the Indian Penal Code, or s. 480 of the Criminal Procedure Code. This section must be read with s. 162.

Where a witness denies, on oath, that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.¹ The summons to produce a document is in English law called a *sub poena duces tecum*.

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

COMMENT.—This section must be read with s. 53. In most cases, witnesses to character not only may but must be cross-examined. The use of character evidence is to assist the Court in estimating the value of the evidence brought against the accused. Holt, C. J., observed in a case that “a man is not born a knave; there must be time to make him so; nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next; it is a misfortune that happens to many men, and his former reputation will signify nothing to him upon this occasion.”²

English law.—Where witnesses are simply called to speak to the character of a prisoner, it is not usual to cross-examine them, excepting in special circumstances.³

141. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

Leading questions.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

When they must not be asked.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

143. Leading questions may be asked in cross-examination.

When they may be asked.

COMMENT.—A ‘leading question’ is one which suggests to the witness the answer which it is desired he should give. But if it merely suggests a subject, without suggesting an answer or a specific thing, it is not leading. Leading questions cannot ordinarily be asked in examination-in-chief or re-examination. The witness is presumed to be biased in favour of the party examining him and might thus be prompted. The reason for excluding leading questions is quite obvious: it would enable a party to prepare his story and evolve it in his very words from the mouth of his witnesses in Court. It would tend to diminish chances of detection of a concocted story. If a witness is allowed to give his narrative in his own words,

¹ Per West, J., in *In re Premchand Dowlatram*, (1887) 12 Bom. 63, 65.

How. St. Tr. 559, 596. ² Taylor, 12th Edn., s. 1429, p. 911;

³ *Haagen Swendsen*, (1902) 14 Best, 12th Edn., s. 262, p. 240.

he is likely, if the story is made up, to leave some loopholes, to which the cross-examiner will scarcely fail to direct his attack.

Leading questions can only be asked in examination-in-chief when they refer to matters which are (1) introductory; (2) undisputed; or (3) sufficiently proved. For, if it were not allowed to approach the points at issue by such questions, the examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, counsel may lead him on to that length, and may re-capitulate to him the acknowledged facts of the case which have been already established.¹

It is the Court, and not counsel for the Crown, who can determine whether leading questions should be permitted, and the responsibility for that permission rests on the Court.²

Leading questions can be freely asked in cross-examination: "First, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent. Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole."³

With respect to the mode of conducting a cross-examination, it is admitted on all hands that leading questions may in general be asked, but this does not mean that the counsel may go the length of putting the very words into the mouth of the witness which he is to echo back again. Neither does it sanction the putting of a question assuming that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact. The rule ought also to receive some further qualification where the witness is evidently hostile to the party calling him, for although it appears in one case to have been laid down that leading questions may always be put in cross-examination, whether a witness be unwilling or not, some restriction should surely be imposed where the witness betrays a vehement desire to serve the cross-examining party. It is no answer to say that the party, who originally called the witness, has brought the evil on his own head, for a fraudulent witness might purposely conceal his bias in favour of one party, and thus induce the other to call him, or he might be an attesting witness, or other person whom it was necessary to examine to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions would be obviously unjust.⁴

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such docu-

Evidence as to matters in writing.

¹ Taylor, 12th Edn., s. 1404, p. 890.

Cal. 467, 509.

² Per Jenkins, C. J., in *Barindra Kumar Ghose v. Emperor*, (1909) 37

³ Best, 12th Edn., s. 641, p. 561.

⁴ Taylor, 12th Edn., s. 1431, p. 912.

ment is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

ILLUSTRATION.

The question is, whether A assaulted B.

C deposes that he heard A say to D—“B wrote a letter accusing me of theft, and I will be revenged on him.” This statement is relevant, as showing A’s motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

COMMENT.—This section is meant to enable parties to carry out the provisions of ss. 91 and 92. It should be read along with those sections. It refers both to the examination-in-chief and cross-examination. A party can compel the opposite party to produce a document (or to make out a case for letting in its secondary evidence)—

- (1) when a witness is about to give evidence as to any (a) contract, (b) grant, or (c) other disposition of property, which is contained in a document; or
- (2) when he is about to make any statement as to the contents of any document.

This rule does not forbid a witness to give oral evidence of statements as to relevant facts, made by other persons, about the contents of documents.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Cross-examination as to previous statements in writing.

COMMENT.—In a way this section is an exception to the general rule forbidding all use of the contents of a written document until the document itself be produced.

Object.—This section indicates one of the modes in which the credit of a witness may be impeached.¹

Principle.—A witness may be cross-examined as to any statements as to relevant facts made by him on a former occasion, in writing or reduced into writing, without showing the writing to him or proving the same. But if it is intended to contradict him by the writing, his attention must be called to the writing. The object of this provision is either to test the memory of a witness or to contradict him by previous statements in writing. Such writing may be documents, letters, depositions, police diaries, etc. It must be noted that the previous record is in writing. The witness may also be contradicted by his previous verbal statements (s. 153, Exception 2).

A witness may be questioned as to his previous written statements for two purposes: it may be to test his memory; and the very object would be defeated if the writing were placed in his hand before the questions were asked; or it may

¹ *Queen-Empress v. Mannu*, (1897) 19 All. 390, 421, F.B.

be to contradict him; and here it would be obviously unfair not to give him every opportunity of seeing how the matter really stands.

If you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.¹

In order that a previous statement reduced to writing may be used in cross-examination, it is not necessary that the writing must be by a person having jurisdiction to reduce the statement to writing.²

Contradiction of witness.—As regards the contradiction of a witness by a previous statement, s. 162 of the Code of Criminal Procedure sanctions a very extraordinary procedure. This section in its ordinary application is intended for the purpose of such contradiction by a written previous statement for which the witness is responsible. This cannot in terms apply to a statement recorded under s. 161 of the Code of Criminal Procedure, for the record of which he cannot be held to be directly responsible and which he does not sign. The Legislature, however, intended that the principle of this section should apply and that the attention of the witness should be called to those parts of diary entries by which it is intended to contradict him by proving that they represent the actual statement of the witness to the police. In many cases the investigating officer may be able to prove that the writing is an accurate record or at any rate, a correct summary of the statements made to him by the witness during the course of the investigation. In that event, the writing comes on the record as proof of the statement of the witness.³

Documents.—A witness can be confronted with the statements made in writing in his account-books : but a clerk who writes the accounts at the mere dictation of his employer cannot be so confronted. In a case, A was employed by B, at intervals of a week or fortnight, to write up B's account-books, B furnishing him with the necessary information either orally or from loose memoranda. It was held that the entries so made could not be given in evidence to contradict A under this section, as previous statements made by him in writing. The statements were really made, not by A but by B, under whose instructions A had written them.⁴

Depositions.—This section, which has to be read with s. 162 of the Code of Criminal Procedure, quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it becomes unnecessary for the statement thereafter to be proved. On the other hand if the statement still requires to be proved that can be done by calling the person before whom the statement was made.⁵ In a trial before a Court of Session, counsel for the accused is not entitled to refer to the depositions given before the committing Magistrate for the purpose of contradicting the witnesses before the Sessions Court, without drawing their attention to the alleged contradictions in their previous depositions and giving them an opportunity of explaining the same.⁶

¹ Per Lord Herschell, L. C., in *Browne v. Dunn*, (1893) 6 R. 67—H. L.

² *Ramkishun*, (1945) 24 Pat. 623.

³ *Heramba Lal Ghosh v. Emperor*, [1945] 1 Cal. 326.

⁴ *Munchershaw Bezoni v. The New Dhurumsey S. & W. Company*, (1880)

4 Bom. 576.

⁵ *Muzaffar Khan v. The Crown*, (1939) 20 Lah. 509.

⁶ *Emperor v. Zawar Rahman*, (1902) 31 Cal. 142, F.B.; *Queen-Empress v. Dan Sahai*, (1885) 7 All. 862; *Reg. v. Arjun Megha*, (1874) 11 B.

Section 162 of the Criminal Procedure Code provides that the accused may be furnished with a copy of the statement of a witness, "in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by s. 145 of the Indian Evidence Act, 1872." The words "if duly proved" clearly show that the record of the statement cannot be admitted in evidence straightaway but that the officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness. The provisions of s. 67 of the Evidence Act apply to this case, as well as to any other similar case. Under s. 162 of the Criminal Procedure Code as amended it is not now permissible for statements to the police, whether oral or written, to be put in evidence, in order to corroborate a prosecution witness, or to contradict a defence witness. A statement to the police can only be used for one purpose, and that is, by the accused to contradict a prosecution witness in the manner provided by this section.¹ The only way a witness can be contradicted by a statement made to the police, under the provisions of s. 162 of the Criminal Procedure Code, is to prove that portion of his statement to the police which contradicts his evidence and to put it to him under this section so that the witness may be given an opportunity of explaining the contradiction; statements made to the police cannot be used at a trial in any other way.² A previous statement of a witness recorded under s. 164 of the Criminal Procedure Code can be used as provided for by this section and s. 155, but it cannot be used as substantive evidence of the facts deposed to therein.³

The first information report recorded under s. 154, Criminal Procedure Code, may be used to contradict the former under this section.⁴ A first information report is not ordinarily substantive evidence. It is merely a previous statement, which may be proved by the prosecution for the purpose of corroborating the first informant, and may be used by the defence for the purpose of contradicting him. For the latter purpose it is essential that the attention of the witness should be drawn to those parts of the document, which it is intended to use for the purpose of contradicting him, in order that he may be given an opportunity to furnish a suitable explanation with regard to the alleged contradictions. Statements in the first information report cannot be used for the purpose of discrediting any witness other than the first informant, for such use is in effect to treat the first information report as substantive evidence in the case.⁵

Police diaries.—"It is the absolute duty of Judges and Magistrates to entirely disregard all statements and entries in special diaries as being in any sense legal evidence for any purpose, except for one solitary purpose of contradicting the Police-officer who made the special diary when they do afford such a contradiction; and even in that case they are not evidence of anything except that such Police-officer made the particular entry which is at variance with his subsequently

H. C. 281; *Emperor v. Lakshman*, (1915) 17 Bom. L. R. 590; *Bal Gangadhar Tilak v. Shri Shrinivas Pandit*, (1915) 17 Bom. L. R. 527, 42 I. A. 185, 39 Bom. 441.

¹ *Emperor v. Vilhu Balu*, (1924) 26 Bom. L. R. 965; *Emperor v. Shaikh Usman*, (1927) 52 Bom. 195, 29 Bom. L. R. 1581; *Azimuddy v. Emperor*, (1926) 54 Cal. 237.

² *The Crown v. Ibrahim*, (1927) 8 Lah. 605; *Gopi Chand v. The Crown*, (1930) 11 Lah. 460; *Narayana v. King-Emperor*, (1932) 56 Mad. 231.

³ *Emperor v. Bishun Datt*, (1927) 50 All. 242.

⁴ *Manimohan Ghosh v. Emperor*, (1931) 58 Cal. 1312.

⁵ *Emperor v. Rahemuddin Mandal*, [1943] 2 Cal. 381.

given evidence; they are not evidence that what is stated in the entry was true or correctly represents what was said or done."¹

"Where the Police officer who made the special diary is allowed to refresh his memory and does look at an entry in the Diary for the purpose of refreshing his memory, the provisions of s. 161 of the Indian Evidence Act...apply, and the accused or his agent is entitled to see such entry in the special diary and to cross-examine such Police officer thereupon. There is no provision in s. 172 of the Code of Criminal Procedure enabling any person other than the Police officer who made the special diary to refresh his memory by looking at the special diary and the necessary implication is that a special diary cannot be used to enable any witness other than the Police officer who made the special diary to refresh his memory by looking at it. This is in truth a general principle of law. The Criminal Court, but not an accused person or his agent, unless the Police officer has been allowed to look at the diary in order to refresh his memory, can use the special diary for the purpose of contradicting the Police officer who made it, but before doing so the Court must comply with the specific enactment of s. 145 of the Indian Evidence Act... and call the attention of the Police officer to such parts of the special diary as are to be used for the purpose of contradicting him, otherwise such a use of the special diary would be illegal. There is no provision in s. 172 of the Code of Criminal Procedure enabling the Court, the prosecution or the accused to use the special diary for the purpose of contradicting any witness other than the Police officer who made it, and the necessary implication is that the special diary cannot be used to contradict any witness other than the Police officer who made it. Section 145 of the Indian Evidence Act....does not either extend or control the provisions of s. 172 of the Code of Criminal Procedure. It is only if the Court uses the special diary for the purpose of contradicting the Police officer who made it that s. 145 of the Indian Evidence Act....applies, and in such case it applies for that purpose only, and not for the purpose of enabling the Court or a party to contradict any other witness in the case, or to show it or any part of its contents to any other witness. No reading of s. 172 of the Code of Criminal Procedure consistent with the rules of construction and a knowledge of the English language is possible by which the special diary is to be used to contradict any person except the Police officer who made it. It is not enacted in s. 172 of the Code of Criminal Procedure by reference to s. 145 of the Indian Evidence Act....or otherwise that if the special diary is used by the Court to contradict the Police officer who made it, it may thereupon or thereafter be used to contradict any other witness in the case."² The Privy Council has approved of this ruling in a criminal appeal from the judgment of the Court of the Judicial Commissioner of the Central Provinces. The Judicial Commissioner admitted in a murder trial statements made by witnesses to the police and entered in the police diary. The Judicial Committee observed that the Judicial Commissioner went wrong in doing so and held that a diary made by the Police officer, under s. 172 of the Code of Criminal Procedure, might be used under that section to assist the Court which tried the case by suggesting means of further elucidating points which need clearing up, and which were material for the purpose of doing justice between the Crown and the accused, but not as containing entries which would by themselves be taken to be evidence of any date, fact, or statement contained in

¹ Per Edge, C. J., in *Queen-Empress v. Mannu*, (1897) 19 All. 390, 412, F.E.; *Dadan Gari v. Emperor*, (1906) 33 Cal. 1023, 1026, 1027.

² Per Edge, C. J., in *Queen-Empress v. Mannu*, (1897) 19 All. 390, 393, 394, F.B.

the diary, and that the Police officer who made the diary might be confronted with it, but not any other witness.¹

Questions lawful in cross-examination.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to,¹ be asked any questions which tend—

- (1) to test his veracity,²
- (2) to discover who he is and what is his position in life,³ or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

COMMENT.—Sections 146 to 152 deal with questions which can be put to a witness with a view to shake his credit by damaging his character. These sections along with s. 132 embrace the entire range of questions which can possibly be put to a witness.

Scope.—This section gives very wide powers to the cross-examiner in addition to those given by s. 138; and is more extensive in scope. As long as the cross-examiner confines his questions to the points of testing the veracity of a witness or discovering his status in life, there seem to be no limits to his power of putting questions. But when he undertakes the difficult yet delicate task of impeaching the character of a witness, the following sections (ss. 147 to 150) give ample protection to a witness in speaking the truth and impose wholesome restraints upon groundless assertions levelled against him. "If any such question relates to a matter relevant to the suit or proceeding... the provisions of s. 132 are by s. 147 declared applicable to it. If the question is as to a matter relevant only in so far as affects the credit of the witness by injuring his character, the Court is by s. 148 directed to decide whether or not the witness is to be compelled to answer, and may... warn the witness that he is not obliged to answer it... When there is a question asked to which the answer may tend to criminate a witness, he may object that it is not as to a matter relevant to a matter in issue, or that, if relevant, it is relevant only as affecting his credit by injuring his character."²

This section extends the power of cross-examination far beyond the limits of s. 138, paragraph 2, which confines the cross-examination to relevant facts, including of course the facts in issue.³

Cross-examination to credit is necessarily irrelevant to any issue in an action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case where everything depends on the Judge's belief or disbelief in the witness's story.⁴

1. 'Hereinbefore referred to', that is, referred to in s. 138, paragraph 2.

2. 'To test his veracity.'—A witness may be examined not only as to the relevant facts but also as to all facts which reasonably tend to affect the credibility of his testimony. This is generally spoken of as cross-examination to credit,

¹ *Dal Singh v. Emperor*, (1917) 19 Bom. L. R. 510, 44 I. A. 137, 44 Cal. 876; *King-Emperor v. Nga Lun Thong*, (1935) 13 Ran. 570, F.B.; *Ahmed Miya v. Emperor*, [1944] 1 Cal. 133.

² Per Turner, C. J., in *The Queen*

v. Gopal Doss, (1881) 3 Mad. 271, 278, F.B.

³ Markby, p. 107.

⁴ *Bombay Cotton Co. v. Raja Bahadur Shivalal Motilal*, (1915) 17 Bom. L. R. 455, 42 I. A. 110, 39 Bom. 386.

inasmuch as a large part at any rate of the facts which are relied on for the purpose are facts which touch the credit and good name of the witness. But no such cross-examination can be legitimate unless it has some reasonable bearing on his credibility.

3. 'To discover who he is', etc.—As preliminary to the cross-examination of a witness as to facts in the case, it is common practice to make inquiry into his relations with the party on whose behalf he was called—business, social and family; also to enquire as to his feelings towards the party against whom his testimony has been given. This is permissible in order to place his testimony in a proper light with reference to bias in favour of the one party or prejudice against the other.¹

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

When witness to be compelled to answer.

COMMENT.—This section only applies to questions referred to in cl. (3) of the preceding section. It refers to "matters relevant to the suit or proceeding." The following section (i.e., s. 148) refers to "matters not relevant to the suit or proceeding."

148. If any such question¹ relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it.

Court to decide when question shall be asked and when witness compelled to answer.

In exercising its discretion, the Court shall have regard to the following considerations:—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies:

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies:

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence:

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

COMMENT.—Object.—Sections 148-152 are intended to protect a witness against improper cross-examination—a protection which is often very much required. But the protection offered by s. 148 is not very effectual, because an innocent man will be eager to answer the question, and one who is guilty will by a claim for protection merely confess his guilt. Nor does the threat contained in s. 149 and this section carry the matter much further.²

¹ *Mc Kelvey*, s. 259.

² *Markby*, 107.

The object of this section is to prevent the unnecessary raking up of the past history of a witness, when it throws no light whatsoever on the questions at issue in a case. It protects a witness from the evils of a reckless and unjustifiable cross-examination under the guise of impeaching his credit. In the course of cross-examination, the temptation is always too great to run down a witness's character; the Legislature has, therefore, wisely provided ample safeguards for the unfortunate witness and placed wholesome checks on the wily cross-examiner. It would seem that under this section a witness cannot be compelled to answer irrelevant questions; but if he chooses to answer them, he cannot be contradicted by other evidence (s. 153).

"In connection with this subject, we may refer to some provisions which we have inserted in order to prevent the abuse of the power of cross-examination to credit. We believe the existence of that power to be essential to the administration of justice, and we believe it to be liable to great abuse. The need for the power and danger of its abuse are proved by English experience, but in this country litigation of various kinds, and criminal prosecutions in particular, are the great engines of malignity, and it is accordingly even more necessary here than in England, both to permit the exposure of corrupt motives and to prevent the use of the power of exposure as a means of gratifying malice. We have accordingly provided as follows:

"Such questions may relate either to matters relevant to the case, or to matters not relevant to the case. If they relate to matters relevant to the case, we think that the witness ought to be compellable to answer, but that his answer should not afterwards be used against him.

"If they relate to matters not relevant to the case except in so far as they affect the credit of the witness, we think that the witness ought not to be compelled to answer. His refusal to do so would, in most cases, serve the purpose of discrediting him, as well as an express admission that the imputation conveyed by the question was true."¹

"It has been much debated whether a witness is bound to answer any question, the direct and immediate effect of answering which might be *to degrade his character*. On this subject the law still remains in a somewhat unsettled state, but thus much would seem to be clear, *viz.*, that where the transaction, to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect on his own conduct. Indeed, it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, when his testimony might be necessary for the protection of the property, the reputation, the liberty, or the life of a fellow-subject, or might at least be required for the due administration of public justice. Were such a rule of protection to prevail, a man who had been convicted and punished for a crime, would, if called as a witness against an accomplice, be excused from testifying to any of the transactions in which he had participated with the accused, and thus the guilty might escape."²

1. 'Any such question.'—When any such question, that is, the question referred to in s. 146, is *not relevant* to the suit or proceeding, the Court must decide whether or not the witness should be compelled to answer it and may warn the witness that he is not obliged to answer it.

Such questions are *proper*—

¹ Proceedings of the Legislative Council.

² Taylor, 12th Edn., s. 1459, p. 932.

(1) if they are of such a nature that the truth of the imputation made touches the credibility of the witness.

They are *improper*—

(1) if the imputation refers to matters (a) so remote in time, or (b) of such a character, that its truth does not affect the credibility of the witness; or

(2) if there is a great disproportion between the importance of the imputation and the importance of the evidence.

If the witness refuses to answer any question it is open to the Court to draw the inference that the answer if given would be unfavourable [cf. s. 114, ill. (b)].

CASES.—Clauses (1), (2).—On an indictment for rape, or for attempt at rape, or for an indecent assault, the prosecutrix cannot be asked in cross-examination whether she had had connection with another person not the accused; and if she denies it evidence cannot be called to contradict her.¹ But she can be asked whether she had on previous occasions connection with the accused,² or whether she was a common prostitute.³

Clause (2).—The accused offered himself as a surety for a person who had been ordered to find security for good behaviour. The Magistrate examined him on oath with a view to ascertain his fitness as a surety. He was asked if he had ever been previously convicted of any offence; and he replied in the negative. A previous conviction which was thirty years old having been proved against him, he was tried for an offence under s. 193 of the Indian Penal Code. The High Court upheld the conviction but modified the sentence on the ground that the Magistrate should have refused to allow the question to be put on the ground that it related to a matter which had happened thirty years before and was so remote in time that it ought not to influence his decision as to the fitness of the surety.⁴

149. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Question not to be asked without reasonable grounds.

ILLUSTRATIONS.

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

¹ Per Kelley, C. B., in *The Queen v. Holmes*, (1871) L. R. 1 C. C. R. 334, 336; *Hodgson's case*, (1812) R. & R. C. C. 211; *Rex v. Clarke*, (1817) 2 Stark. 241.

² *Rex v. Martin*, (1834) 6 C. & P.

562; *Reg. v. Cockcroft*, (1870) 11 Cox. 410.

³ *Rex v. Barker*, (1829) 3 C. & P. 589,

⁴ *Emperor v. Ghulam Mustafa* (1904) 26 All. 371, 374.

COMMENT.—The cross-examiner must have reasonable grounds to believe that the imputation made against the witness is well-founded. As to what are reasonable grounds which justify such questions, see the illustrations.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Procedure of Court in case of question being asked without reasonable grounds.

COMMENT.—Object.—“The object of these sections [ss. 149, 150, 151, 152] is to lay down, in the most distinct manner, the duty of counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles, according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honourable advocates and by the public....”¹

“In order to protect witnesses against needless questions of this kind, we enact that any advocate who asks such questions without written instructions (which the Court may call upon him to produce, and may impound when produced) shall be guilty of contempt of Court, and that the Court may record any such question, if asked by a party to the proceedings. The records of the question in the written instructions are to be admissible as evidence of the publication of an imputation intended to harm the reputation of the person affected, and such imputations are not to be regarded as privileged communications, or as falling under any of the exceptions to s. 499 of the Indian Penal Code, merely because they were made in the manner stated. Upon a trial for defamation, it would, of course, be open to the person accused to show, either that the imputation was true, and that it was for the public good that the imputation should be made (Excpn. 1, s. 499, Indian Penal Code), or that it was made in good faith for the protection of the interest of the person making it or of any other person (Excpn. 9). This is the only method which occurs to us of providing at once for the interests of a *bona fide* questioner and an innocent witness.”²

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Indecent and scandalous questions.

COMMENT.—This section forbids the putting of any question which is indecent or scandalous, unless it relates to facts in issue or is necessarily connected with them.

¹ Abstract of Proceedings of the Council of the Governor General of India, Vol. XI (1872), p. 133.

² Proceedings of the Supreme Le-

gislative Council, *Gazette of India*, pp. 237, 238, of the Supplement, dated March 30, 1872.

CASE.—In a proceeding to recover maintenance by a married woman for her illegitimate children, under s. 488 of the Criminal Procedure Code, she “can be examined to prove non-access of her husband during their married life, without independent evidence being first offered to prove the illegitimacy of the children.”¹

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Questions intended to insult or annoy.

COMMENT.—The Court has the power to forbid any question which is intended to insult or annoy, or which is couched in a needlessly offensive form.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exclusion of evidence to contradict answers to questions testing veracity.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

ILLUSTRATIONS.

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it. Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a bloodfeud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

COMMENT.—**Object.**—The object of the section is to prevent trials being spun out to an unreasonable length. If every answer given by a witness upon

¹ *Rozario v. Ingles*, (1893) 18 Bom. 468, 472.

the additional facts mentioned in s. 146 could be made the subject of fresh inquiry, a trial might never end. These matters are after all not of the first importance, beyond what is comprised in the exceptions.¹

Principle.—When a witness deposes to facts which are *relevant*, evidence may be given in contradiction of what he has stated. But when what he deposes to affects only his *credit*, no evidence to contradict him can be led for the sole purpose of shaking his credit by injuring his character. However, a witness answering falsely can be proceeded against for giving false evidence under s. 193 of the Indian Penal Code. There are two exceptions to this: (1) previous conviction when denied can be proved (s. 511, Criminal Procedure Code); and (2) any fact tending to impeach his impartiality when denied can be proved. This is a salutary rule and is meant to curtail every inquiry. If contradictory evidence be allowed on side issues for instance, as shaking the witness's credit by injuring his character, there can be no limit to an enquiry. The main issue in the case is almost always likely to be fogged by subsidiary inquiries which are profitless as well as perplexing. The two exceptions engrafted on the section are capable of easy proof and are material in assessing the weight to be attached to the testimony of an individual witness. The section should be strictly construed and narrowly interpreted, otherwise Courts would have to investigate, on most imperfect materials, questions which have no bearing upon the matter really in contest.² The section is based on the decision in *Att.-Gen. v. Hitchcock*³ in which Pollock, C. B., says that a witness may be contradicted as to anything he denies having said provided it be "connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other."

The rule limiting the right to call evidence to contradict witnesses on collateral questions excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute; the test being whether the fact is one which the party proposing to contradict would have been allowed himself to prove in evidence.⁴

1. 'If he answers falsely, he may afterwards be charged with giving false evidence.'—These words were apparently inserted in forgetfulness of the fact that the Indian law as to false evidence differs from the English law as to perjury in not requiring that the matter charged as false should have been material to the issue.⁵

154. The Court may, in its discretion,¹ permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Question by party
to his own witness.

¹ Markby, 108.

² *Bhogilal v. Royal Insurance Co. Ltd.*, (1927) 30 Bom. L. R. 818, 6 R.A. 142, P.C.

³ (1874) 1 Ex. 91, 100.

⁴ *Kazi Gulam Ali bin Kazi Ismail v. H. H. Aga Khan*, (1863) 6 B. H. C. (O. C. J.) 93.

⁵ Stokes, Vol. II, p. 929.

COMMENT.—Principle.—Where a party calling a witness and examining him discovers that he is either hostile or unwilling to answer questions put to him, he can obtain permission of the Court to put questions to him which may be put to him by way of cross-examination. The section does not say that a person who calls a witness may cross-examine him in certain circumstances, but he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examination.¹

A discretion is given to the Court to allow or not to allow a person to cross-examine his own witness as hostile. The witness may be asked leading questions (s. 143); or questions as to his previous statements in writing (s. 145); or any questions under s. 146; or his credit may be impeached (s. 155).

Under this section, before a party calling a witness can cross-examine him, it is not necessary that the witness should first be declared to be hostile to the party calling him, and the Court has unfettered discretion to allow a counsel to put questions of a cross-examination nature to his own witness even though he did not show himself hostile to the party calling him, but the Court ought not to exercise its discretion unless during the examination-in-chief something happens which makes it necessary for the facts to be got from that witness by cross-examination; it is necessary before the procedure under this section can be adopted that leave of the Court should be asked for and obtained or permission given by the Court *suo motu* for the said purpose before such questions are put to a witness though the section may not make such a procedure imperative and the permission contemplated by the section should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him.²

1. 'The Court may, in its discretion.'—A party who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without the leave of the Judge. Whether a witness is a litigant or not, it is a matter of discretion in the Judge whether he shows himself so hostile as to justify his cross-examination by a party calling him.³

"The Judge, in his discretion, will sometimes allow leading questions to be put in a direct examination, as, for instance, where the witness, by his conduct in the box, obviously appears to be hostile to the party producing him, or interested for the other party, or unwilling to give evidence, or where special circumstances render the witness rather the witness of the Court than of the party.... Questions which assume facts to have been proved which have not been proved, or that particular answers have been given which have not been given, will not at any time be permitted."⁴

The Court has the discretion, under this section, to permit the prosecution to test, by way of cross-examination, the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross-examination.⁵

Hostile witness.—A 'hostile witness' is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the Court.⁶

¹ *Bikram Ali Pramanik v. Emperor*, (1929) 57 Cal. 801; *Luchiram Matilal Boid v. Radha Charan Poddar*, (1921) 49 Cal. 93; *Khijraddin Sonar v. Emperor*, (1925) 53 Cal. 372.

² *Ammathayarammal v. Official Assignee, Madras*, (1932) 56 Mad. 7; *Mohan Banjari v. The King Emperor*,

(1933) 30 N. L. R. 55.

³ *Price v. Manning*, (1889) 42 Ch. D. 372.

⁴ Taylor, 12th Edn., s. 1401, p. 891.

⁵ *Amrita Lal Hazra v. Emperor*, (1915) 42 Cal. 957.

⁶ *Panchanan Gogai v. Emperor*, (1930) 57 Cal. 1266.

A witness who is unfavourable is not necessarily hostile.¹ A witness who is gained over by the opposite party is a hostile witness. The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.²

Where a party is allowed to cross-examine his own witness, the effect of that cross-examination must be to discredit that witness altogether and not merely to get rid of part of his testimony, and hence that witness's evidence must be excluded altogether. In the case of a witness for the prosecution, this means so far as it supports the case for the prosecution, for obviously the defence is entitled to rely on so much of his evidence as supports their case: otherwise a party who found that his witness had given evidence which supported his adversary's case could get rid of the evidence by declaring him hostile.³

CASES.—Hostile witnesses.—In a suit to recover moneys alleged to have been expended by the plaintiff in the performance of a ceremony, the plaintiff's witnesses having failed to prove any damages, he called the defendant as a witness who gave evidence to the effect that the plaintiff had no claim. The Court refused to allow the plaintiff to cross-examine the defendant. It was held that the refusal to cross-examine was not justifiable.⁴

During the trial of a case, the accused obtained a process for the attendance of a witness. Before the witness appeared the accused asked the Court to countermand the order for his attendance, but the Court refused to do so. When the witness attended, the accused declined to examine him. He was, thereupon, examined by the Court, and upon the accused claiming the right to cross-examine the witness, the Court refused to allow him to do so. It was held that under the circumstances the witness could not be regarded as a witness for the defence, and that the accused should have been given an opportunity to cross-examine him.⁵

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

¹ *Luchiram Matilal Boid v. Radha Charan Poddar*, (1921) 49 Cal. 93.

² *Kalachand Sircar v. Queen Empress*, (1886) 13 Cal. 53 ; *Nga Nyein v. King-Emperor*, (1932) 11 Ran. 4.

³ *Emperor v. Mokbul Khan*, (1928) 56 Cal. 145 ; *Sohrai Sao v. King-*

Emperor, (1929) 9 Pat. 474.

⁴ *Radha Jeebun Moostuffy v. Taramonee Dossee*, (1869) 12 M. I. A. 380.

⁵ *Mohendro Nath Das Gupta v. Emperor*, (1902) 29 Cal. 387.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

ILLUSTRATIONS.

(a) A sues B for the price of goods sold and delivered to B.

C says that A delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

COMMENT.—Principle.—This section enables the parties to give independent testimony as to the character of a witness in order to indicate that he is unworthy of belief by the Court. Its provisions apply to both criminal and civil cases.

The section indicates four ways in which the credit of a witness may be impeached: (a) by the adverse party, or (b) with the consent of the Court by the party who calls him. They are:—

- (1) evidence of persons that the witness is unworthy of credit;
- (2) proof that the witness (i) has been bribed; (ii) has accepted the offer of a bribe; or (iii) has received any other corrupt inducement;
- (3) former statements inconsistent with the present evidence; and
- (4) general immoral character of the prosecutrix in cases of rape or attempt to ravish.

The above sub-clause (i) has an explanation, which is a re-echo of s. 153. Witnesses deposing to character can be asked in cross-examination to give reasons for their opinion. They are not liable to be contradicted in those reasons; but, if they are false, they can be charged with giving false evidence.

The first three grounds are general. They indicate that the credit of a witness may be impeached, first of all, by the best of evidence, that is, his own former statements to the contrary; secondly, he can be shown to be unworthy of credit by the oral testimony of other persons; and, lastly, his credit can be completely overthrown by proving that he had accepted (a) a bribe, or (b) an offer of a bribe, or (c) any other corrupt inducement. The fourth ground is a special one. If the woman complaining of rape or attempt to ravish is proved to be a woman generally of immoral character, her story in the complaint will necessitate strong proof.

This section should be strictly construed and narrowly interpreted, otherwise Courts would have to investigate, on most imperfect materials, questions which have no bearing upon the matter really in contest.¹

¹ *Bhogilal v. Royal Insurance Co.* 6 Ran. 142, P.C.
Ltd., (1927) 30 Bom. L. R. 818

English law.—The rule of English law is that the credit of a witness may, amongst other ways, be impeached by evidence of acts contradictory of the evidence given by him. The express provision of the Indian law is less extensive. The witness's credit, it is provided, can only be impeached in certain specified ways (s. 155), that is, by questions or by testimony going directly to his credit, not mediately through a contradiction of the particular matter deposed to by him in the case.¹

Clause 1.—In order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him upon his oath. Such evidence can be given, and the practice is ancient and undoubted.²

Where the general reputation of a witness has been thus impeached, the party calling him may re-establish his credit by cross-examining the witnesses who have spoken against him as to their means of knowledge and the grounds of their opinion, or as to their hostile feelings towards the person whose testimony they have discredited, or as to their own character and conduct, or by calling other witnesses, either to support the character of the first witness or to attack in their turn the general reputation of the impeaching witnesses. How far this plan of recrimination may be carried is not yet formally determined, though the practice is said by some lawyers to be in conformity with the doggerel rule of the civil law, *in testem testes, et in hos, sed non datur ultra*, that is, a discrediting witness may himself be discredited by other witnesses, but no further witnesses can be called to attack the characters of these last.³

The opinion of another Court in another case as to a witness cannot be put in to impeach his credit.

Clause 3.—The words “which is liable to be contradicted” mean “which is relevant to the issue.”⁴

This sub-clause does not do away with the necessity of drawing the attention of the witness to the previous statement because this section is controlled by s. 145.⁵

Section 154, Criminal Procedure Code.—The first information report recorded under s. 154, Criminal Procedure Code, may be used to contradict the informer under this section.⁶

Section 164, Criminal Procedure Code.—A previous statement of a witness recorded under s. 164, Criminal Procedure Code, can be used as provided for by this section, but it cannot be used as substantive evidence of the facts deposed to therein.⁷

Clause 4.—In a case of rape the general immoral character of the complainant is relevant. The non-consent of the complainant is a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent.⁸

Explanation.—In the examination-in-chief a witness cannot be asked the reasons for his belief that another witness is unworthy of credit. Such questions can only be asked in cross-examination. But it is very dangerous in cross-exa-

¹ *Reg. v. Sakharam Mukundji*, (1874) 11 B. H. C. 166, 169.

² *The Queen v. Brown and Hedley*, (1867) L. R. 1 C. C. R. 70.

³ Taylor, 12th Edn., s. 1473, p. 939.

⁴ *Khadijah Khanum v. Abdool Kureem Sheraji*, (1889) 17 Cal. 344, 347.

⁵ *Gopi Chand v. The Crown*, (1930) 11 Lah. 460.

⁶ *Manimohan Ghosh v. Emperor*, (1931) 58 Cal. 1312.

⁷ *Emperor v. Bishun Datt*, (1927) 50 All. 242.

⁸ Cunningham, 360.

mination to ask a witness his reasons for believing a witness to be untrustworthy. He is, by such a question, enabled to state any unfavourable fact without fear of contradiction.¹

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Questions tending to corroborate evidence of relevant fact admissible.

ILLUSTRATION.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

COMMENT.—Principle.—This section permits the Court to allow a witness, who has testified to a relevant fact, to corroborate his testimony by deposing to any circumstances which he observed at or near the time or place at which such relevant fact occurred. The frame of the section indicates that questions are to be asked in examination-in-chief. In most cases, it paves the way of cross-examination, which, if successful, brings out contradiction; but which, if unsuccessful, must inevitably result in corroboration. Like contradiction, corroboration is meant to test the truthfulness of a witness.

The Legislature has indicated how and when a witness may be contradicted (ss. 145, 153 and 158). We have now to see in what circumstances a witness may be corroborated. First of all, he may be asked questions tending to corroborate evidence of a relevant fact (s. 156); secondly, former statements made by him may be proved to corroborate later testimony to the same fact (s. 157); thirdly, when any statement relevant under s. 32 or s. 33 is proved, all matters may be proved either to contradict or corroborate it (s. 158).

157. In order to corroborate the testimony of a witness, any former statement¹ made by such witness relating to the same fact at or about the time when the fact took place,² or before any authority legally competent to investigate³ the fact, may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact.

COMMENT.—Principle.—A witness's former statement relating to the same fact made at or about the time when the fact took place may be proved in order to corroborate his present testimony. Under this section the testimony of a witness may be corroborated by a former statement made by him (1) about the time of the occurrence, or (2) before a legally competent authority. Generally, the statements made immediately on the occurrence of an event contain truth, for no time has elapsed for concoctions to creep in; similarly, statements solemnly made in the presence of a legally competent authority bear the impress of truth. Statements like these are, therefore, a legitimate means of corroboration. They support the credibility of the person whose evidence is corroborated. Where a counsel re-

¹ Cunningham, 360.

peated to other persons the conversation that had taken place between him and his junior, the evidence of those persons was held admissible under this section.¹ But "the force of any corroboration by means of previous consistent statements must evidently depend upon the truth of the proposition that he who is consistent deserves to be believed. If that proposition be not universally true, what becomes of the virtue of previous consistent statements? One may persistently adhere to falsehood once uttered, if there is a motive for it; and should the value of such a corroboration ever come to be rated higher than it now is, nothing would be easier than for designing and unscrupulous persons to procure the conviction of any innocent men, who might be obnoxious to them, by first committing offences, and afterwards making statements, to different people and at different times and places implicating those innocent men."²

English law.—The English law on this point is different. It does not admit such statements into evidence. The danger of letting them in lies in the fact that repetition of the same story over and over again ought not to gain in credence.³

Testimony of approver.—"From the position occupied by an approver witness, his evidence is necessarily regarded with very great suspicion as being tainted, and that although he may, on the main facts connected with the commission of the offence, be truthful and reliable, it is when he comes to implicate any particular person, that his evidence should be accepted with the greatest caution. Nothing is easier for a man than to narrate events with accuracy, and yet more so, when coming to describe the acts of a particular person, to change his personality so as to exculpate a guilty friend, and to implicate an innocent person or an enemy."⁴ Hence, it is a rule that corroboration to the evidence of an accomplice must proceed from an independent and reliable source; and that previous statements made by the accomplice himself, though consistent with the statements made by him at the trial, are insufficient for such corroboration.⁵

Previous statements of an accomplice may be proved under this section, and may be corroborative.⁶

1. 'Any former statement.'—Such statement may be written or verbal, on oath, or in ordinary conversation. A witness's account-books, duly kept in the ordinary course of business, may be used under this section.⁷

2. 'At or about the time when the fact took place.'—These words mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. What is a reasonable time is a question of fact in each case. The object of the section is to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them then would be accurate. But if time for reflection passes between the event and the subsequent statement, it not only can be of very little value but may be actually dangerous as such statements can be easily brought into being. Such delayed statements are inadmissible. The section

¹ *Bomanjee Cowasjee*, In re, (1906) 34 I. A. 55, 60, 9 Bom. L. R. 3, 34 Cal. 129. See also *Sm. Nistarini Dassee v. Rai Nundo Lall Bose*, (1900) 5 C. W. N. 16n; *Shwe Kin v. King-Emperor*, (1906) 3 L. B. R. 240; *Mi Myin v. King-Emperor*, (1908) 5 L. B. R. 4.

² *Reg. v. Malapa bin Kapana*, (1874) 11 B. H. C. 196, 198.

³ *The King v. Parker*, (1783) 3

Doug. 242, 244; Taylor, 12th Edn., s. 1476, p. 941.

⁴ *Queen Empress v. Bepin Biswas*, (1884) 10 Cal. 970, 973.

⁵ *Reg. v. Malapa bin Kapana*, (1874) 11 B. H. C. 196.

⁶ *Barkat Ali v. The Crown*, (1916) P. R. No. 2 of 1917 (Cr.).

⁷ Stokes, Vol. II, p. 931..

says that the statement must be made "at or about the time" not "at any time after the event."¹

3. 'Any authority legally competent to investigate.'—An Inspector of the Criminal Investigation Department is "an authority legally competent to investigate" within the meaning of this section.²

The first information report recorded under s. 154, Criminal Procedure Code, is not a substantive piece of evidence; it can be used merely by way of corroboration or contradiction and not any further. It is inadmissible for the purpose of proving that the facts stated in it are correct.³ It should not be admitted in evidence or placed before the jury unless it is admissible under one of the provisions of the Evidence Act. If, however, it is admissible it should be placed before the jury with proper directions. An information lodged by a person who died subsequently, relating to the cause of his death, is admissible as a substantive piece of evidence under the provisions of s. 32(1). At the same time, the jury should be reminded that the statement in question had not been made on oath nor had it been tested by cross-examination but that after bearing these points in mind it would be for the jury to attach to it such weight as they considered necessary.⁴

Effect of s. 162, Criminal Procedure Code.—The general rule laid down in s. 157 is controlled by the special provisions of s. 162, Criminal Procedure Code, so far as statements to the police taken under s. 161, Criminal Procedure Code, are concerned. Section 162 prohibits the use of the record containing the statement of a witness to the police as evidence against the accused as well as proof of such statement by oral evidence.⁵ Such statements cannot be used as corroboration under this section.⁶ Cases which laid down that the record was inadmissible but oral evidence as to the nature of those statements could be given to corroborate the testimony of a witness are no longer of any authority in virtue of the amended s. 162, Criminal Procedure Code.⁷ A first information does not prove itself: it has to be tendered under some section of the Evidence Act. The usual course is for the prosecution to tender it under this section to corroborate the informant, and the defence can prove it to impeach his credit under s. 155, or to contradict him under s. 145, of the Act. It is admissible also in proper cases under ss. 8 and 32(1) of the Act.⁸ Unless there is substantive evidence before the Court, first information reports and other reports by a witness cannot be used in corroboration. Where the prosecution witness gives a different account in evidence before the Court, his previous reports cannot be admissible as corroborative evidence against the accused.⁹ In order to corroborate a witness by a previous deposition,

¹ *Appadurai*, In re, [1945] Mad. 821.
² *Muthukumaraswami Pillai v. King-Emperor*, (1912) 35 Mad. 397, F.B.

³ *Gajadhar Lal v. King-Emperor*, (1931) 7 Luck. 552, 562; *Marimohan Ghosh v. Emperor*, (1931) 58 Cal. 1312.

⁴ *Emperor v. Mohammad Shaikh*, [1942] 2 Cal. 144; *Emperor v. Rahenuddin Mandal*, [1943] 2 Cal. 381.

⁵ *Rakha v. The Crown*, (1925) 6 Lah. 171, disapproving *Mam Chand v. The Crown*, (1924) 5 Lah. 324.

⁶ *Jagwa Dhanuk v. King-Emperor*, (1925) 5 Pat. 63; *King-Emperor v. Maung Tha Din*, (1926) 4 Ran. 72,

F.B.; *Rakha v. The Crown*, (1925) 6 Lah. 171, disapproving *Mam Chand v. The Crown*, (1924) 5 Lah. 324; *King-Emperor v. Nga Lun Thoun*, (1935) 13 Ran. 570, F.B.

⁷ The following cases are no longer of any authority; *Emperor v. Hammaraddi*, (1914) 16 Bom. L. R. 603, 39 Bom. 58; *Fanindra Nath Banerjee v. Emperor*, (1908) 36 Cal. 281; *Muthukumaraswami Pillai v. King-Emperor*, (1912) 35 Mad. 397, F.B.

⁸ *Azimuddy v. Emperor*, (1926) 54 Cal. 237.

⁹ *King-Emperor v. Nga Hlaing*, (1928) 6 Ran. 481.

or by a first information report recorded under s. 154, Criminal Procedure Code, these documents must be produced, for they are documents required by law to be reduced to writing and secondary evidence of their contents cannot be given.

Dying declaration.—Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as a dying declaration under s. 32, but it may be relied on, under this section, to corroborate the testimony of the complainant when examined in the case.¹

CASES.—In 1874, five out of six persons who were named as having committed a murder were arrested, and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In 1886, the absconder was apprehended and tried before the Court of Session upon the charge of murder. Of the witnesses examined at the first trial, only one was living. He was examined and his deposition given in 1874 was also admitted. It was held that the deposition taken in 1874 of the surviving witness was admissible under this section as corroboration of her evidence given at the trial of the prisoner.²

Where plaintiffs sought to establish their pedigree by proving *inter alia* that A and B were brothers, it was held that a statement to that effect made by one of the plaintiffs in a deposition given long before the controversy in suit arose was admissible in evidence.³

The Madras High Court has held that a statement by a witness recorded by a Magistrate under s. 164 of the Criminal Procedure Code is admissible in evidence to corroborate the statement made by that witness before the committing Magistrate and from which statement he resiles in the Sessions Court.⁴ According to the Bombay High Court such a statement is not admissible in evidence.⁵

Oral evidence of a statement made by a witness to a competent police-officer in the city of Bombay, on the occasion of an identification parade, and recorded in a *panchanama* at the time, is admissible for corroboration in virtue of s. 63 of the Bombay City Police Act.⁶

158. Whenever any statement, relevant under section 32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person has been called as a witness and had denied upon cross-examination the truth of the matter suggested.

COMMENT.—Sections 32 and 33 of the Act permit the putting in of statements, oral or written, or statements made in a judicial proceeding, by a person who cannot be examined as a witness. The Legislature intends by this section to submit such statements to the tests of contradiction and corroboration, in the

¹ *Emperor v. Rama Sattu*, (1902) 4 Bom. L. R. 434.

² *Queen-Empress v. Ishri Singh*, (1886) 8 All. 672.

³ *Jadu Nath Sarkar v. Mahendra Nath Rai Chowdhury*, (1907) 12 C. W. N. 266.

⁴ *Velliah Kone v. King-Emperor*, (1922) 45 Mad. 766.

⁵ *Emperor v. Akbar Badoo*, (1910) 34 Bom. 599, 12 Bom. L. R. 663.

⁶ *Emperor v. Wahiduddin (No. 2)*, (1929) 32 Bom. L. R. 327, 54 Bom. 528.

same way as if those statements were made by the witness in the box. No sanctity attaches to such statements simply because the person is dead or cannot be examined as a witness. His credibility may be impeached or confirmed in the same manner as a living witness.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document¹:

When witness may use copy of document to refresh memory.

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

COMMENT.—This section says how a witness may refresh his memory. He may, during his examination, refresh his memory by referring to—

(1) any writing made by himself (*i*) at the time of the transaction concerning which he is questioned,¹ or (*ii*) so soon afterwards that the Court considers it likely that the transaction was fresh in his memory;

(2) any such writing made by any other person and read by the witness within the time aforesaid;²

(3) professional treatises, if the witness is an expert (s. 159).

It is not necessary that the writing referred to should be one which is admissible in evidence. A document not produced in Court within proper time and, in consequence, rejected, may be referred to to refresh memory if it comes within the purview of this section.³ Even if a *panchanama* containing a statement made by a witness as to the crime committed is not admissible in evidence, a panch witness can make use of it for the purpose of refreshing his memory, where the *panchanama* is made by the police but is immediately read over to the panch and admitted by him to be correct.⁴ But a Court should not take cognizance of the terms of a document which is inadmissible in evidence and has been referred to by a witness merely in order to refresh his memory as to a date.⁵ The mere handing of a document to a witness for the purpose of refreshing his memory does not make the document a piece of evidence in the case.⁶ It is immaterial what the document is, whether it be a book of account, letter, tradesman's bill, notes made by the witness, or any other document which is likely to assist the memory of the witness.

¹ *Maugham v. Hubbard*, (1828) 8 B. & C. 14.

² *Burrough v. Martin*, (1809) 2 Camp. 112; *Abdul Salim v. Emperor*, (1921) 49 Cal. 573.

³ *Jewan Lal Daga v. Nilmani Chaudhuri*, (1927) 30 Bom. L. R. 305, 55 I. A. 107, 7 Pat. 305.

⁴ *Emperor v. Mahadeo Dewoo*, (1945) 47 Bom. L. R. 992.

⁵ *Bhogilal Bhikachand v. Royal Insurance Co. Ltd.*, (1927) 6 Ran. 142, 30 Bom. L. R. 818, P.C.

⁶ *Tribhuvan Ojha v. Ramchandra Dube*, (1934) 14 Pat. 233.

It is not necessary that the witness should have specific recollection of the facts themselves (s. 160).

The adverse party has the right of seeing the writing so used and cross-examining the witness thereupon (s. 161).

The grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness are threefold: (i) to secure the full benefit of the witness's recollection as to the whole of the facts; (ii) to check the use of improper documents; and (iii) to compare his oral testimony with his written statement.¹

The section says a witness may refresh his memory as stated. He is not bound to do so; and the accused cannot compel him to do it.²

1. 'Copy of such document.'—The Act does not require that this copy shall have been made by the witness himself, or in his presence, or so as to enable him to swear to its accuracy.³ A register which is not a secondary evidence of the contents of a bond may be referred to by a witness for the purpose of refreshing his memory.⁴

CASES.—Unstamped document.—An insufficiently stamped promissory note can be used for the purpose of refreshing memory.⁵

Post-mortem examination reports.—A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence.⁶

Dying declaration.—The dying statement of a deceased person may be proved in the ordinary way by a person who heard it; and the writing may be used for the purpose of refreshing the witness's memory.⁷

Special diary.—The special diary may be used by the police-officer who made it, and by no witness other than such officer, for the purpose of refreshing his memory.⁸

160. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Testimony to facts stated in document mentioned in section 159.

ILLUSTRATION.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

COMMENT.—The principle of the foregoing section is carried a step further here. A witness may refresh his memory by a document even though he has no specific recollection of the facts themselves; but he must be sure that the facts were correctly recorded in the document. If the witness had not correctly record-

¹ Per Field, J., in *In the matter of the Petition of Jhubboo Mahton*, (1882) 8 Cal. 739, 744.

² *In the matter of the Petition of Kali Churn Chunari*, (1881) 8 Cal. 154.

³ Stokes, Vol. II, p. 932.

⁴ *Taruck Nath Mullick v. Jeamat Nosya*, (1879) 5 Cal. 353.

⁵ *Birchall v. Bullough*, [1896] 1 Q.

B. 325; *Maugham v. Hubbard*, (1828) 8 B. & C. 14.

⁶ *Raghuni Singh v. The Empress*, (1882) 9 Cal. 455.

⁷ *In the matter of the Petition of Samiruddin*, (1881) 8 Cal. 211.

⁸ *Queen-Empress v. Mannu*, (1897) 19 All. 390, F.B.; *King-Emperor v. Nga Lun Thoung*, (1935) 13 Ran. 570, F.B.

ed the words used by the speaker but only his impression, then the notes made by him would be inadmissible to prove the words used.¹ The section applies when the witness states in so many words that he does not recollect, and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts he can only testify regarding the contents of the document before him and explain that he recorded correctly what the deponent said at the time.²

That a document may be used as the refresher of memory, it is by no means necessary that the witness, after having seen it, should have any independent recollection of the facts mentioned therein or connected therewith. It will suffice if he remembers that he has seen the paper before, and that, when he saw it, he knew its contents to be correct, or even if, entirely forgetting the circumstances themselves, and the fact of his having seen the paper, he can still, in consequence of recognising his signature or writing upon it, vouch for the accuracy of the memorandum, or swear to the particular fact in question.³

A witness may refresh his memory from a writing made by another person and inspected and signed by him, at the close of the day on which it was made, when it brings to his mind neither any recollection of the facts mentioned therein nor of the writing itself but when it nevertheless enables him to testify to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine.⁴

The notes of a speech taken at the time by a police-officer should be proved in the following way. The police-officer should describe his attendance at the place where the speech was made by the accused and the making of the relevant speech, and give a description of its nature so as to identify his presence there and his attention to what was going on. After that it is quite enough if he says: "I wrote down that speech and this is what I took down."⁵

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it: such party may, if he pleases, cross-examine the witness thereupon.

Right of adverse party as to writing used to refresh memory.

COMMENT.—Principle.—This section gives the opposite party a right of inspecting documents tendered in Court for the purpose of refreshing the memory of a witness. He may look at the writing to see what kind of writing it is in order to check the use of improper documents.⁶ He has a right to look at any particular writing before or at the moment when the witness uses it to refresh his memory in order to answer a particular question; but if he then neglects to exercise his right, he cannot continue to retain the right throughout the whole of the subsequent examination of the witness.⁷

In all cases where documents are used to refresh the memory of a witness, it is usual and reasonable—and if the witness has no independent recollection of the fact, it is necessary—that they should be produced at the trial, and that the opposite counsel should have an opportunity of inspecting them, that, on cross or re-exa-

¹ Per Wallis, J., in *Mylapore Krishnasami v. Emperor*, (1909) 32 Mad. 384, 395.

² *Partap Singh v. The Crown*, (1925) 7 Lah. 91.

³ Taylor, 12th Edn., s. 1412, p. 896.

⁴ *Abdul Salim v. Emperor*, (1921) 49 Cal. 573.

⁵ *Public Prosecutor v. Venkatrama Naidu*, [1944] Mad. 113.

⁶ Per Field, J., in *In the matter of the Petition of Jhubboo Mahton*, (1882) 8 Cal. 739, 745.

⁷ *In the Matter of the Petition of Jhubboo Mahton*, (1882) 8 Cal. 739.

mination, he may have the benefit of the witness's refreshing his memory by every part. Neither is the adverse party bound to put in the document as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to, but, if he goes further than this, and asks questions about other parts of the memorandum, it seems that he thereby makes it his own evidence.¹

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

Production of documents.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State,¹ or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and, if the interpreter disobeys such direction, he shall be held to have committed an offence under s. 166 of the Indian Penal Code.

Translation of documents.

COMMENT.—This section refers to official as well as private documents. The second paragraph of the section provides that when a document, in respect of which an objection to production or admissibility is raised, refer to matters of State, the Court has no power to inspect the document. With regard to other documents in respect of which privilege is claimed, the Court, if it thinks fit, may inspect the documents.

Principle.—When a witness is summoned to produce a document which is in his possession or power, he must bring it to Court, notwithstanding any objection that he may have with regard to its production or admissibility. Under the provisions of O. XVI, r. 6, of the Civil Procedure Code, a person may be summoned to produce a document without being summoned to give evidence. He may either attend the Court personally or may depute another to produce it. In neither case is he liable to be cross-examined (s. 139). If the document be in his possession or power, he is bound, under this section, to bring the document with him to Court notwithstanding any objection he may have to its production (e.g., ss. 130-131 or ss. 126-129) or admissibility. Having brought it to Court, he is entitled to raise his objection to their production or admissibility. The Court has then to decide the validity of any such objection. For the purpose of deciding on the validity of the reason that may be offered for withholding them, the Court may receive evidence,² and in so doing it is entitled to inspect the document, if it does not refer to matters of State (s. 123). If the document in question happens to be in a language not known to the presiding officer, he may get it translated; and call upon the translator to keep its contents secret.

In criminal cases, the protection under s. 126 afforded to communications by a client to lawyers cannot be availed of against an order to produce the document; the document must be produced, and then, under this section it will be for the Court,

¹ Taylor, 12th Edn., s. 1413, p. 597. *thu Chettiar*, (1908) 32 Mad. 62, 64.

² *Vekatachella Chettiar v. Sampas*.

after inspection of the document if it deems fit, to consider and decide any objections regarding its production or admissibility.¹

1. 'Matters of State'.—See s. 123 as to 'affairs of State'. Where an officer is summoned to produce an official document, he is bound to produce it in Court. He should raise the objection in Court, and the question whether that objection is well-founded is one for the Court to decide. For this purpose the Court is not entitled to inspect the document if it refers to matters of State. It must decide the question without such inspection by examining the officer producing it or otherwise. It is for the Court to decide whether a particular document is an unpublished record relating to affairs of State, i.e., whether it is a document in respect of which privilege can properly be claimed. But once the Court has decided that the document is one in respect of which privilege may be claimed, i.e., it is an unpublished record relating to matters of State, the question whether the document should be produced or not is one entirely in the discretion of the head of the department concerned, and the Court has no power to inspect the document to determine the question of its admissibility. The officer claiming privilege for a document that he is summoned to produce must appear and produce the document in Court and must satisfy the Court that his claim is well-founded. It is for the Court to decide whether the claim should be allowed or not. But once the Court holds that the document is one with regard to which privilege can be claimed, in other words, that it is a communication made to a public officer in official confidence or that it is an unpublished official record relating to affairs of State which it would not be in the public interest to disclose, the question whether privilege should be claimed for it or not is entirely within the discretion of the officer in charge of the documents. The Court for the purpose of deciding whether the claim to privilege is well-founded or not is not entitled to look at the documents. It must decide the question of the validity of the objection without looking at the documents.²

Statements made and documents produced by assessee before the Income-tax Officer for the purpose of showing the income of such assessee do not refer to matters of State.³

163. When a party calls for a document¹ which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving, as evidence, of document called for and produced on notice.

COMMENT.—Principle.—Where a party to a suit gives notice to the other party to produce a document, and when produced, he inspects the same, he is bound to give it as evidence if the other party requires him to do so.⁴ The reason for this rule is that it would give an unconscionable advantage to a party to enable him to pry into the affairs of his adversary, without at the same time subjecting him to risk of making whatever he inspects evidence for both parties.⁵

Scope.—This section is applicable to criminal trials as well as to civil actions.⁶ Records of statements made not on oath in the course of a departmental inquiry

¹ *Ganga Ram v. Habib-Ullah*, 26 Cal. 281.

(1935) 58 All. 364.

² *In re Mantubhai Mehta*, (1943) 46 Bom. L. R. 802.

³ *Venkatachella Chettiar v. Sampathu Chettiar*, (1908) 32 Mad. 62; *Jadobram Dey v. Bulloram Dey*, (1893)

⁴ *Mahomed v. Abdul*, (1903) 5 Bom. L. R. 380.

⁵ Taylor, 12th Edn., s. 1817, p. 1126.

⁶ *Emperor v. Makhani Lal Datta*, [1939] 2 Cal. 429.

by Government are not public documents. But, when the defence had called for their production and they were, thereupon, produced and inspected and used for the cross-examination of the prosecution witnesses, it was held that the Crown could insist on the entire statements being put in under this section.¹

1. 'When a party calls for a document'.—The terms of the section make it clear that the section refers to documents asked for by a party during trial. It does not refer to documents produced under O. XI, r. 14, of the Civil Procedure Code.

Using, as evidence, of document production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

ILLUSTRATION.

A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

COMMENT.—Principle.—If a party having a document in his possession refuses to produce it when called upon at the hearing to do so, he is not at liberty afterwards to give the document in evidence for any purpose without (1) the consent of the other party, or (2) the order of the Court. This is meant as a penalty for unfair tactics. The Civil Procedure Code, O. XI, r. 15, makes a similar provision.

This section does not contemplate the production of a document for inspection. It contemplates that one party should call upon another in Court to produce a document of which the first party has given the other notice to produce. It does not give him any right, at any stage of the case, to call upon his opponent to produce the document and, after inspecting it, use it or not as he sees fit. It is doubtful if this section applies to criminal proceedings.²

165. The Judge may, in order to discover or to obtain proper proof of relevant facts,¹ ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question²:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask

¹ *Government of Bengal v. Santiram Mandal*, (1930) 58 Cal. 96.

² *Shyamdas Kapur v. Emperor*, (1932) 60 Cal. 341.

under section 148 or 149 ; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

COMMENT.—Principle.—This section is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and enquire into every fact whatever.¹ Each party in a case is interested in setting up his own case and demolishing the one set up by his adversary. There is danger in some cases that the whole truth may not come out before the Court. The Judge, in order to discover, or to obtain proper proof of relevant facts, may exercise very wide powers indeed ; but they all pivot upon the ascertainment of relevant facts. He may approach the case from any point of view, and is not tied down to the ruts marked out by the parties. He can ask (1) any question he pleases, (2) in any form, (3) at any time, (4) of any witness, (5) or of the parties, (6) about any fact relevant or irrelevant. No party is entitled to object to any such question or order, or to cross-examine the witness without the leave of the Court. But out of the evidence so brought out, the Judge can only use that which is relevant and duly proved. There are three exceptions to the very wide powers given to the Judge. The witness cannot be compelled to answer (1) any question or to produce any document contrary to ss. 121 to 131 ; or (2) any question contrary to s. 148 or 149 ; and (3) the Judge shall not dispense with primary evidence of any document except as provided before.

In civil as well as in criminal proceedings the Legislature has vested ample powers in the Courts to exercise this power (Civil Procedure Code, O. X, rr. 2, 4 ; O. XVI, r. 14 ; s. 540, Criminal Procedure Code).

"When the counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure as the Judge is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant. . . and he is, therefore, at the same time placed under the special protection of the Court, which may, at its discretion, allow a party to cross-examine him, but this cannot be asked for as a matter of right. This principle applies equally whether it is intended to direct the examination to the witness's statements of fact, or to circumstances touching his credibility, for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of them just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers—upon every answer given to the Court, and is subject to the Court's control".²

"In a great number of cases—probably, the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries, which may incidentally tend to something relevant ; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties

¹ Stephen, 162.

11 B. H. C. 166, 168.

² *Reg. v. Sakharam Mukundji*, (1874)

and their agents, and we have inserted in the bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him, but to inquire to the utmost into the truth of the matter. We do not think that the English theories, that the public have no interest in arriving at the truth and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England.

"In India, in an enormous mass of cases, it is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that this section has been framed".¹

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions, and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138.²

1. 'In order to discover or to obtain proper proof of relevant facts'.—The power of the Court to direct production of any document under this section is subject to the plain proviso at the beginning of that section that the direction must be "in order to discover or obtain proper proof of relevant facts." The commentaries show clearly that the object of allowing the Judge to ask irrelevant questions under this section is to obtain "indicative evidence" which may lead to the discovery of relevant evidence.³

2. 'Cross-examine any witness upon any answer, etc.'—A party to a proceeding is not allowed to cross-examine a witness upon an answer given by him to a question put by the Court without the permission of such Court.⁴ If what the witness has said in answer to the questions put to him by the Judge is adverse to either of the parties, the Judge ought to allow the witness to be cross-examined upon his answers. A general fishing cross-examination ought not to be permitted.⁵ The accused should be given an opportunity to cross-examine a witness on the answers to questions put by the Court.⁶

A Judge can himself look into previous statements of witnesses recorded in the police diary, even though the defence neither requested him to do so nor applied for copies of such statements, and if the interests of justice demand the Judge may himself, under this section, put questions to witnesses to bring out discrepancies of vital nature between such statements and the evidence of those witnesses in Court.⁷

Proviso 1.—This proviso says that the judgment must be based upon facts declared by this Act to be relevant (ss. 5-55) and duly proved (ss. 56-100). The Judge will not be permitted to found his judgment upon the class of statements to which he may resort as indicative evidence, for the reason that it would tempt judges to be satisfied with second-hand reports, would open a wide door to fraud, and would

¹ Proceedings of the Legislative Council.

² *Nor Buz Kazi v. The Empress*, (1880) 6 Cal. 279, 283.

³ *Krishna Ayyar v. Balakrishna Ayyar*, (1933) 57 Mad. 635.

⁴ *Gopal Lall Seal v. Manick Lall Seal*, (1897) 24 Cal. 288, 290.

⁵ *Coulson v. Disborough*, [1894] 2 Q. B. 316.

⁶ *In the matter of The Empress v. Grish Chunder Talukdar*, (1879) 5 Cal. 614; *Mshendro Nath Das Gupta v. Emperor*, (1902) 29 Cal. 287.

⁷ *Emperor v. Lal Miya*, [1943] 1 Cal. 543.

waste an incalculable amount of time.¹ It would be intolerable that the Court should decide rights upon suspicions unsupported by testimony.²

Proviso 2.—This proviso subjects the Judge to the provisions contained in ss. 121-131, s. 148 and s. 149. The Judge has the power of asking irrelevant questions to a witness, if he does so in order to obtain proof of relevant facts, but if he asks questions with a view to criminal proceedings being taken against the witness, the witness is not bound to answer them, and cannot be punished for not answering them under s. 179, Indian Penal Code.³ A witness should not be coerced to answer a question.⁴

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Power of jury or assessors to put questions.

COMMENT.—The jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which the Judge considers proper.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case,¹ if it shall appear to the Court before which such objection is raised² that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.³

No new trial for improper admission or rejection of evidence.

COMMENT.—**Object.**—The object of the section is that the Court of appeal or revision should not disturb a decision on the ground of improper admission or rejection of evidence, if in spite of such evidence, there are sufficient materials in the case to justify the decision.⁵ In other words, technical objections will not be allowed to prevail, where substantial justice appears to have been done.

Principle.—The improper (a) admission, or (b) rejection, of evidence, is no ground for a new trial, or reversal, of any decision, if

- (i) in the case of improper admission—
there is sufficient evidence to justify the decision, independently of the evidence objected to and admitted; or
- (ii) in the case of improper rejection—
the decision could not be varied, if the rejected evidence had been received.

Civil and criminal cases.—The provisions of this section are made applicable

¹ Stephen, 162, 163.

² *Sreenutty Mohun Bibi v. Saraf Chand Mitter*, (1897) 2 C. W. N. 18, 27.

³ *Queen-Empress v. Hari Lakshman*, (1885) 10 Bom. 185.

⁴ *Queen-Empress v. Ishri Singh*, (1886) 8 All. 672, 675.

⁵ *Mohur Singh v. Ghuriba*, (1870) 6 Beng. L. R. 495, 499, P.C., 15 W. R. (P. C.) 8.

by the clearest possible words to all judicial proceedings in or before any Court.¹ The section applies to civil cases and to criminal cases whether or not the trial has been had before a jury.²

Civil.—In the case of first appeals, the provisions of this section have to be read with s. 99 of the Civil Procedure Code (Act V of 1908), which provides: "No decree shall be reversed or substantially varied nor shall any case be remanded, in appeal on account of. . . any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case. . . ." See also O. XLI, rr. 27 to 29.

In second appeals, one of the grounds justifying the appeal is "a substantial error or defect in the procedure. . . which may possibly have produced error or defect in the decision of the case upon the merits" [s. 100 (1) (c) of the Civil Procedure Code of 1908.]

There is, however, a great difficulty in applying the provisions of this section to the generality of cases which come before the High Court on second appeal. On second appeal, the High Court has no power to deal with the sufficiency of evidence; it has only a right to entertain questions of law. Its duty being thus confined, when evidence has been wrongly admitted by the Court below, the High Court has, generally speaking, no right to decide, whether the remaining evidence in the case, other than that which has been improperly admitted, is sufficient to warrant the finding of the Court below. The only cases which it may with propriety dispose of under such circumstances without a remand, are those, where independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusion upon other grounds.³

Where the first Court improperly admits evidence the High Court has power to interfere and remand the case for a new trial.⁴

The omission to receive an important document⁵ or to examine a material witness⁶ justifies a reversal of the decision.

Criminal.—In criminal cases also the Legislature has provided a similar safeguard. "No finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered. . . on appeal or revision, on account. . . of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice [s. 537 (d) of the Criminal Procedure Code]."

When a part of the evidence which has been allowed to go to the jury is found to be irrelevant and inadmissible, it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under this section or to quash the verdict and order a re-trial.⁷

¹ *Reg. v. Navroji Dadabhai*, (1872) 9 B. H. C. 358, 374.

² *Imperatrix v. Pitamber Jina*, (1877) 2 Bom. 61, 65; *Queen v. Hurribole Chunder Ghose*, (1876) 1 Cal. 207, 216; *Emperor v. Panchu Das*, (1920) 47 Cal. 671, F.B.

³ *Womes Chunder Chatterjee v. Chundee Churn Roy Chowdhry*, (1881) 7 Cal. 293, 296.

⁴ *Palakdhari Rai v. Manners*, (1895) 23 Cal. 179.

⁵ *Devidas Jagivan v. Pirjada Be-*

gam, (1884) 8 Bom. 377; *Talewar Singh v. Bhagwan Das*, (1907) 12 C. W. N. 312, 8 C. L. J. 147.

⁶ *Moni Lal Bandopadhyaya v. Khiroda Dasi*, (1893) 20 Cal. 740.

⁷ *Queen-Empress v. Ramchandra Govind Harshe*, (1895) 19 Bom. 749; contra, *Wafadar Khan v. Queen-Empress*, (1894) 21 Cal. 955; *Dal Singh v. Emperor*, (1917) 19 Bom. L. R. 510, 44 I. A. 137, 44 Cal. 876; *Ramesh Chandra Das v. Emperor*, (1919) 46 Cal. 895.

Letters Patent, cl. 26.—The provisions of this section apply to the High Court when acting under cl. 26 of the Letters Patent.¹ Section 12 of the Lower Burma Courts Act is similar to this clause, and this section therefore applies to proceedings under it.²

1. 'In any case'.—These words are very wide and include criminal trials by jury.³

2. 'The Court before which such objection is raised'.—The Court which is to decide upon the sufficiency of the evidence to support the conviction is the Court of review or the appellate Court,⁴ but not the Court below.⁵

3. 'Decision'.—The word 'decision' is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and, if it was the intention of the Legislature to use an expression which would apply equally to civil as to criminal proceedings, there is probably no other word which would have answered their purpose better.⁶

SCHEDULE.

[REPEALED BY THE REPEALING ACT (I of 1938), s. 2 and sch.]

¹ *Queen v. Hurribole Chunder Ghose*, (1876) 1 Cal. 207; *Imperatrix v. Pitamber Jina*, (1877) 2 Bom. 61; *Emperor v. Narayan*, (1907) 9 Bom. L. R. 789, 82 Bom. 111, F.B. See *Emperor v. Panchu Das*, (1920) 47 Cal. 671, F.B.

² *Thein Myin v. King-Emperor*,

(1917) 9 L. B. R. 60, F.B.

³ *Queen-Empress v. Ramchandra Govind Harshe*, (1895) 19 Bom. 749, 762.

⁴ Per Westropp, C. J., in *Imperatrix v. Pitamber Jina*, (1877) 2 Bom. 61, 65.

⁵ *Queen v. Hurribole Chunder Ghose*, (1876) 1 Cal. 207, 217.

⁶ *Ibid.*

SUMMARY.

THE law of evidence is the most important branch of adjective law. It is to legal practice what logic is to all reasoning. Without it, trials might be infinitely prolonged to the great detriment of the public and the vexation and expense of suitors. It is by this that the Judge separates the wheat from the chaff among the mass of acts that are brought before him, decides upon their just and mutual bearing, learns to draw correct inferences from circumstances, and to weigh the value of direct testimony. It is by this guide that he is able to tread his way with comparative safety among the burning ploughshares of perjury, forgery, and fraud that beset his footsteps, and to rest his judgment on a basis of probabilities at least comparatively satisfactory to his own mind.¹

The Indian Evidence Act has codified the rules of English law of evidence with such modifications as are rendered necessary by the peculiar circumstances of this country. But the Act is not exhaustive, and cases do arise for the solution of which principles of common law are resorted to. The Code, though chiefly drawn upon the lines of the English law of evidence, was not intended to be a servile copy of it.

The object of codification is that, on any point specifically dealt with by an Act, the law should be ascertained by interpreting its language, instead of, as before, roaming over a vast number of authorities to discover what the law is, and extracting it by a critical examination of the prior decisions.²

One great object of the Evidence Act was to prevent laxity in the admissibility of evidence, and to introduce a more correct and uniform rule of practice than was previously in vogue. The Evidence Act is not intended to do more than prescribe rules for the admissibility or otherwise of evidence on the issue as to which the Courts have to record findings.

The main principles which underlie the law of evidence are—

- (1) evidence must be confined to the matters in issue;
- (2) hearsay evidence must not be admitted; and
- (3) the best evidence must be given in all cases.

The following tabular scheme³ sufficiently explains the general arrangement of the Indian Evidence Act—

¹ Norton.

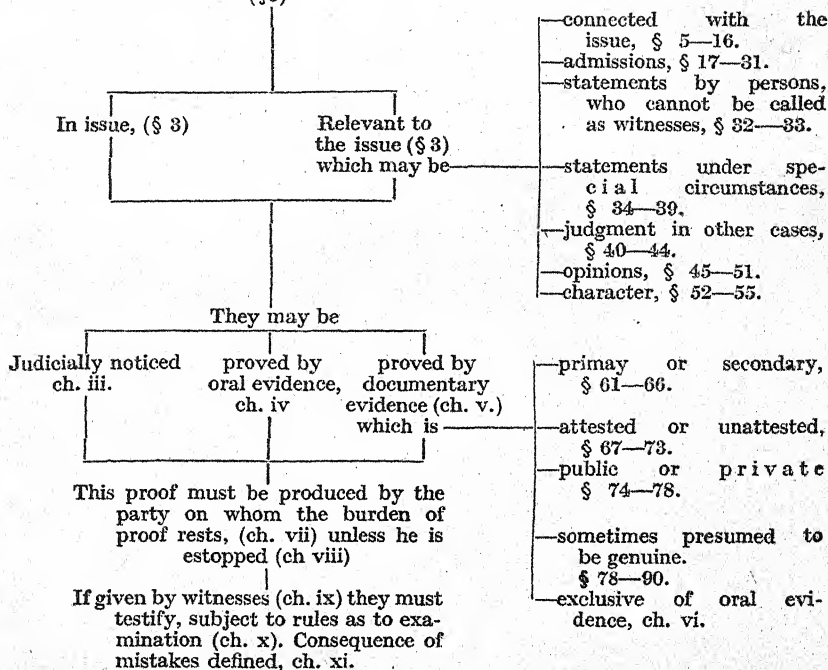
² *Bank of England v. Vagliano Bros.*,

[1891] A. C. 107.

³ Stephen's Introduction, p.12.

The object of legal proceedings is the determination of rights and liabilities which depend on facts.

(§3)



The Evidence Act is divided into three Parts comprising eleven Chapters. Part I consists of two Chapters dealing with definitions and relevancy of facts. Part II comprises Chapters III to V which provide for proof of facts by oral or documentary evidence. Part III embodies Chapters VI to XI which contain rules for the production of evidence in Court and the duties of the Court in dealing with the evidence produced before it.

PART I.

RELEVANCY OF FACTS.

Chapter I deals with definitions of various terms.

'Evidence' means and includes—

(1) Oral evidence, i.e., all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry.

(2) Documentary evidence, i.e., all documents produced for the inspection of the Court.

Evidence may be given in any suit or proceeding.

- (1) of every fact in issue, and
- (2) of relevant facts (s. 3).

(1) 'Fact.'—It means and includes—

(i) any thing, state of things, or relation of things, capable of being perceived by the senses ;

(ii) any mental condition of which any person is conscious (s. 3).

The expression 'facts in issue' means and includes any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows (s. 3).

(2) **Relevant fact.**—One fact is said to be relevant to another when the one is connected with the other in any of the ways relating to the relevancy of facts (s. 3).

Presumptions.—The topic of 'presumptions' has been referred to in s. 4. A presumption means a rule of law that Courts and Judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved. Presumptions are divided into presumptions of fact ("may presume" of the Evidence Act) and presumptions of law. Presumptions of law are again sub-divided into presumptions of law *absolute* or *conclusive* ("conclusive proof" of the Evidence Act), and presumptions of law *disputable* or *rebuttable* ("shall presume" of the Evidence Act).

Whenever it is provided by the Evidence Act that the Court—

'may presume' a fact, it may either regard such facts as proved unless and until it is disproved, or may call for proof of it :

'shall presume' a fact, it must regard such fact as proved, unless and until it is disproved.

When one fact is declared by this Act to be 'conclusive proof' of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it (s. 4).

Chapter II.—Evidence may be given (1) of the existence or non-existence of every fact in issue, and (2) of such other facts as are declared to be relevant, and of no others (s. 5). No evidence can be given of a fact which a person is disentitled to prove under the Civil Procedure Code (*ibid*). There is a difference between relevancy of evidence and admissibility of evidence.

What facts are relevant.—The following facts are relevant—

1. Facts so connected with a fact in issue as to form part of the same transaction (s. 6).

2. Facts which are the occasion, cause, or effect, of relevant facts or facts in issue (s. 7).

3. Facts showing a motive or preparation for, or previous or subsequent conduct in relation to, any fact in issue or relevant fact (s. 8).

4. Facts (i) necessary to explain or introduce a fact in issue or relevant fact, or (ii) which support or rebut an inference suggested by such a fact, or (iii) which establish the identity of any thing or person

whose identity is relevant, or (*iv*) which fix the time or place at which any fact in issue or relevant fact happened, or (*v*) which show the relation of parties by whom any such fact was transacted (s. 9).

5. Anything said, done, or written, by a conspirator in reference to the common intention of all the conspirators (s. 10).

6. Facts (*i*) that are inconsistent with any fact in issue or relevant fact, or (*ii*) which make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable (s. 11).

7. Facts which will enable the Court to determine the amount of damages which ought to be awarded (s. 12).

8. Where the question is as to the existence of any right or custom (*i*) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence; (*ii*) particular instances in which the right or custom was (*a*) claimed, recognised or exercised, or (*b*) disputed, asserted, or departed from (s. 13).

9. Facts showing the existence of any state of (1) mind (e.g., intention, knowledge, good faith, negligence, rashness, ill-will, good-will), or (2) body, or (3) bodily feeling, when such state of mind or body is relevant (s. 14).

10. When the question is whether an act was accidental or intentional—the fact that it formed part of a series of similar occurrences (s. 15).

11. Existence of any course of business according to which an act regarding which there is a question would have been done (s. 16).

Relevancy: admissibility.—The word 'relevant' is not co-extensive with the word 'admissible.' A relevant fact is a fact that has a certain degree of probative force. Relevancy is fully defined in ss. 6-11 of the Evidence Act. Certain facts are relevant under ss. 5-55, but all such facts are not admissible in evidence. There may arise restrictions as to their admissibility under ss. 91-99, 115-117, and 121-130. All admissible evidence is therefore relevant, but all relevant evidence is not admissible.

Sections 17-55 deal with statements which are relevant under certain circumstances. These include—

- I. Admissions.
- II. Confessions.
- III. Statements by persons who cannot be called as witnesses.
- IV. Statements under special circumstances.
- V. Judgments of Courts.
- VI. Opinions of third persons.
- VII. Character of parties.

I. Admissions.—The Indian Evidence Act deals with admissions as follows:—

1. An admission is a statement, oral or documentary, which suggests any inference, as to any fact in issue or relevant fact, and which is made by—

- (i) a party to the proceedings ;
- (ii) an agent authorised by such party ;
- (iii) a party suing or sued in a representative character making admissions while holding such character ;
- (iv) a person who has a proprietary or pecuniary interest in the subject-matter of the suit during the continuance of such interest ;
- (v) a person from whom the parties to the suit have derived their interest in the subject-matter of the suit during the continuance of such interest (s. 18) ;
- (vi) a person whose position it is necessary to prove in a suit, if such statements would be relevant in a suit brought by or against himself (s. 19).
- (vii) a person to whom a party to the suit has expressly referred for information, in reference to a matter in dispute (s. 20) ;

2. An admission is relevant and may be proved as against the person who makes it or his representative in interest. It cannot be proved by or on behalf of the person who makes it or by his representative, except in three cases—

- (1) when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under s. 32 ;
- (2) when it consists of a statement of the existence of any state of mind or body made at or about the time when such state of mind or body existed and is accompanied by conduct rendering its falsehood improbable ;
- (3) if it is relevant otherwise than as an admission (s. 21).

3. Oral admissions as to contents of a document are not relevant unless

- (1) the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such documents, or
- (2) the genuineness of the document produced is in question (s. 22). According to English law such admissions may be used as proof.

4. An admission is not relevant in a *civil* case if it is made

- (1) upon an express condition that evidence of it is not to be given, or

- (2) under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given (s. 23).

A barrister, pleader, attorney, or vakil, is not exempted from giving evidence of any matter of which he may be compelled to give evidence under s. 126 (s. 23, Explan.).

5. An admission is not a conclusive proof of the matter admitted, but it may operate as estoppel (s. 31).

II. Confessions.—A 'confession' is an admission made at any time by any person charged with a crime stating or suggesting an inference that he committed that crime. The law of confession is laid down as follows :—

- 1. A confession is irrelevant

(1) if it is obtained by any (a) inducement, (b) threat, or (c), promise ;

(2) such inducement, etc., must have reference to the charge ;

(3) such inducement, etc., must proceed from a person in authority ;

(4) such inducement, etc., must be sufficient to give the accused grounds for supposing that by making it he would gain an advantage or avoid an evil of a temporal nature in reference to the proceedings against him (s. 24).

But a confession made after the removal of the impression caused by such inducement, threat, or promise, is relevant (s. 28).

2. A confession made to a police officer is not admissible (s. 25).

3. A confession made by a person in police custody is not admissible, unless it is made in the presence of a Magistrate (s. 26).

But when any fact is discovered in consequence of information received from such person, so much of the information as relates to the facts discovered is admissible (s. 27).

4. A confession does not become irrelevant if it is made

(i) under a promise of secrecy ; or

(ii) in consequence of a deception practised on the accused ; or

(iii) when the accused was drunk ; or

(iv) in answer to questions which the accused need not have answered ; or

(v) when the accused was not warned that he was not bound to make it (s. 29).

5. When more persons than one are tried jointly for an offence, and one of them makes a confession affecting himself and some other of such persons, the confession may be taken into consideration against such other person as well as against the person making it (s. 30).

As to the difference between an 'admission' and a 'confession', see p. 68.

III. Statements by a witness who cannot be produced.—

A statement of relevant fact made by a person—

(i) who is dead ;

(ii) who cannot be found ;

(iii) who has become incapable of giving evidence ;

(iv) whose attendance cannot be procured without unreasonable delay or expense

is relevant under the following circumstances :—

(1) When it relates to the cause of his death.

(2) When it is made in the course of business ; such as entry in books, or acknowledgment of the receipt of any property, or date of a document.

(3) When it is against the pecuniary or proprietary interest of the person making it or when it would have exposed him to a criminal prosecution.

(4) When it gives opinion as to a public right or custom or matters of general interest and it was made before any controversy as to such

right or custom had arisen.

(5) When it relates to the existence of any relationship between persons as to whose relationship the maker had special means of knowledge and was made before the question in dispute arose.

(6) When it relates to the existence of any relationship between persons deceased and is made in any will or deed or family pedigree, or upon any tombstone or family-portrait, and was made before the question in dispute arose.

(7) When it is contained in any deed, will or other document.

(8) When it is made by a number of persons and expresses feelings relevant to the matter in question (s. 32).

Admissibility of depositions in former trials in subsequent trials.—Evidence given by a witness (i) in a judicial proceeding, or (ii) before any person authorised by law to take it, is relevant in a subsequent judicial proceeding or a later stage of the same proceeding—

(i) when the witness is dead,

(ii) when he cannot be found,

(iii) when he is incapable of giving evidence,

(iv) when he is kept out of the way by the adverse party, and

(v) when his presence cannot be obtained without an amount of delay or expense which the Court considers unreasonable.

Such evidence will only be admissible—

(1) if the proceeding was between the same parties, or their representatives in interest;

(2) if the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(3) if the question in issue were substantially the same in the first as in the second proceeding (s. 33).

Evidence given on a different occasion is also admissible to contradict a witness (s. 155) or to corroborate him (s. 157).

IV. Statements made under special circumstances.—There are statements which are relevant under special circumstances. These are—

1. Entries in books of account regularly kept in the course of business. Such entries are not alone sufficient evidence to charge any person with liability (s. 34).

2. Entries in public or official books or records made by a public servant or by a person enjoined by law in the discharge of his duty (s. 35).

3. Statements made in maps or charts offered for public sale or in maps or plans made under the authority of the Central Government or any Provincial Government (s. 36).

4. Statements of facts of public nature made in

(1) an Act of Parliament;

(2) an Act of the Central Legislature or any other legislative authority in Province; and

(3) Notifications in the *Official Gazette* or the *Government Gazette*

of any Dominion or Colony or possession of His Majesty or the *London Gazette* (s. 37).

5. Statements of the law of any country contained in

(1) a book published under the authority of the Government of that country, and

(2) published reports of rulings of the Courts of such country (s. 38).

Opinions of persons skilled in foreign laws may be invited by the Court (s. 45).

When the evidence to be given forms part of a statement, conversation, document, book, or series of letters or papers, so much of the statement, etc., as the Court considers necessary to the full understanding of the nature and effect of the statement, shall only be given (s. 39).

V. Judgments.—Judgments are relevant facts of great importance. Judgments in civil cases do not preclude any one but parties to the suit or their representatives from contesting the subject-matter upon which they are pronounced. There are four exceptions to this principle.

1. The existence of a judgment, decree or order is a relevant fact if by law it has the effect of preventing any Court from taking cognizance of a suit, or holding a trial (s. 40).

2. A final judgment of a Court exercising (1) probate, (2) matrimonial, (3) admiralty, or (4) insolvency jurisdiction which

(i) confers upon or takes away from any person any legal character or,

(ii) declares any person to be entitled to (a) any such character, or (b) any specific thing absolutely,

is *relevant* when (a) the existence of any such legal character, or (b) the title of any such person to any such thing, is relevant.

Such judgment is *conclusive proof*

(1) that any legal character, which it confers, accrued at the time when such judgment came into operation ;

(2) that any legal character to which it declares any person to be entitled accrued at the time mentioned in the judgment ;

(3) that any legal character which it takes away from any person ceased at the time mentioned in the judgment ;

(4) that any thing to which it declares a person to be entitled was that person's property at the time at which the judgment declares to be his (s. 41).

There are two other sections dealing with conclusive proof :

(1) birth during marriage is conclusive proof of legitimacy (s. 112) ;

(2) notification in the Gazette that a portion of British territory is ceded to an Indian State before the commencement of Part III of the Government of India Act, 1935, is conclusive proof of cession of that territory (s. 113).

3. Judgments relating to matters of a public nature are relevant though such judgments are not conclusive proof of that which they state (s. 42).

4. Judgments, the existence of which is a fact in issue or is relevant under some other provision of the Evidence Act (s. 43).

Any party to a suit may show that a judgment which is relevant was delivered by a Court not competent to deliver it or was obtained by fraud (s. 44).

VI. Opinions.—The Court has often to form an opinion on technical matters and extraneous assistance is necessary. The Act allows such opinion in the following cases—

1. Opinion of experts, i.e., persons skilled in (i) foreign law, (ii) science, (iii) art, (iv) handwriting, and (v) finger impressions (s. 45).

2. Any fact which supports or is inconsistent with the opinion of experts (s. 46).

3. Opinion of a person acquainted with the handwriting of the person by whom a document is written when the Court has to form an opinion as to the person by whom it was written (s. 47).

A person is said to be acquainted with the handwriting of another person when

(i) he has seen that person write;

(ii) he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person;

(iii) in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him (s. 47).

4. Opinion as to the existence of a right or custom of a person who knows of its existence (s. 48).

5. Opinions of persons having special means of knowledge regarding

(i) usages and tenets of a body of men or family;

(ii) the constitution and government of any religious or charitable foundation;

(iii) the meaning of words or terms used in particular districts or by particular classes of people (s. 49).

6. Opinion, as to the relationship of one person to another, of a person, expressed by his conduct, who as a member of the family has special means of knowledge on the subject (s. 50).

Whenever the opinion of a person is relevant, the grounds on which such opinion is based are also relevant (s. 51).

VII. Character.—‘Character’ includes both reputation and disposition. Relevancy of character may arise either in (1) civil, or (2) criminal cases.

(1) In civil cases the fact that the character of any person is such as to render probable or improbable any conduct imputed to him

is irrelevant, except in so far as such character appears from facts otherwise relevant (s. 52).

But the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant (s. 55).

(2) In criminal cases the fact that the accused is of *good character* is relevant (s. 53). But the fact that he is of *bad character* is irrelevant unless—

(i) evidence has been given that he has a good character (s. 54); or

(ii) the bad character is itself a fact in issue (s. 54, Explan. 1).

A previous conviction is relevant as evidence of bad character (*ibid.*, Explan. 2).

PART II

ON PROOF.

Chapter III.—Facts which need not be proved.—These are :—

1. Facts of which the Court will take judicial notice (s. 56). Section 57 enumerates thirteen facts of which the Court is bound to take judicial notice.

2. Facts which the parties or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which, by any rule of pleading, they are deemed to have admitted by their pleadings (s. 58).

Chapter IV.—Oral evidence.—All facts, except the contents of documents, may be proved by oral evidence (s. 59). Oral evidence must be direct, that is to say,

(1) if it refers to a fact which could be seen, it must be the evidence of a witness, who says he saw it;

(2) if it refers to a fact which could be heard, it must be the evidence of a witness, who says he heard it;

(3) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(4) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds (s. 60).

‘Circumstantial evidence’ is opposed to ‘direct evidence’. It means a fact from which some other fact is inferred. ‘Direct evidence’ means testimony given by a man as to what he has himself perceived by his own senses. It is the testimony of a witness to the existence or non-existence of the fact or fact in issue. As regards admissibility, direct and circumstantial evidences stand on the same footing.

Opinion of an expert expressed in a book commonly offered for sale may be proved by the production of such book, if the author

(1) is dead, or

(2) cannot be found, or

(3) has become incapable of giving evidence, or

(4) cannot be called as a witness without an amount of delay or expense, which the Court regards as unreasonable (*ibid.*)

Chapter V.—Documentary evidence.—The contents of documents may be proved either by (1) primary evidence, or (2) secondary evidence (s. 61).

(1) **Primary evidence** means the document itself produced for the inspection of the Court (s. 62).

Where a document is executed in several parts, each part is primary evidence. Where a document is executed in counterpart, each counterpart is primary evidence as against the parties executing it (*ibid.*, Explan. 1).

Where a number of documents are made by uniform process, such as printing, lithography, or photography, each one is primary evidence of the contents of all the rest.

(2) **Secondary evidence** means and includes—

- (i) certified copies given under the provisions of this Act;
- (ii) copies made from the original by mechanical processes, which in themselves ensure accuracy of the copy and, copies compared with such copies;
- (iii) copies made from or compared with the original;
- (iv) counterparts of documents, as against the parties who did not execute them;
- (v) oral account of the contents of a document, given by some person who has himself seen it (s. 63).

Documents must be proved by primary evidence (s. 64).

Secondary evidence may be given of the existence, condition or contents of a document in the following cases :—

- (1) When the document is in the possession of
 - (i) the person against whom it is to be proved, or
 - (ii) any person out of the reach of, or not subject to, the process of the Court, or
 - (iii) any person who is legally bound to produce it does not produce it after notice to produce the same.
- (2) When the existence or contents of the original have been proved to have been admitted in writing by the person against whom it is to be proved or his representative. In such a case the written admission is admissible.
- (3) When the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason, not arising from his own neglect or default, produce it in reasonable time. In such a case any secondary evidence of its contents is admissible.
- (4) When the original is of such a nature as not to be easily movable. In such a case any secondary evidence of its contents is admissible.
- (5) When the original is a public document.

(6) When the original is a document of which a certified copy is permitted by this Act or any law in force in India. A certified copy is admissible.

(7) When the original consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. Such result may be proved by the evidence of any person skilled in the examination of such documents (s. 65).

When notice to produce a document is not required.—Notice under s. 65 to produce a document is not required—

- (1) when the document to be proved is itself a notice ;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it ;
- (3) when the adverse party has obtained possession of the original by fraud or force ;
- (4) when the adverse party, or his agent, has the original in Court ;
- (5) when the adverse party, or his agent, has admitted the loss of the document ;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court (s. 66).

Signature and handwriting.—If a document is alleged to be signed or to have been written by any person, the signature or handwriting of so much of the document, as is alleged to be in that person's writing, must be proved to be in his handwriting (s. 67).

Handwriting can be proved in the following ways.

- (1) By the evidence of the writer himself—
- (2) By the opinion of experts who can compare handwritings (s. 46).
- (3) By the evidence of a person who is acquainted with the handwriting of a person by whom the writing in question is supposed to have been written and signed (s. 47).
- (4) By the Court comparing the writing or signature in question with any others proved to the satisfaction of the Court to be genuine (s. 73).
- (5) The Court may direct any person present to write any words or figures to enable the Court to compare them with any words or figures alleged to have been written by him (*ibid.*).

Documents requiring attestation.—Documents required by law to be attested are used in evidence as follows :—

1. One attesting witness at least must be called for proving its execution, if such witness is

- (i) alive,
- (ii) subject to the process of the Court, and
- (iii) capable of giving evidence (s. 68).

But, if the document is a registered one and is not a will, then it

is not necessary to call an attesting witness, unless its execution is denied by the person who has executed it (*ibid.*, proviso).

2. If such witness cannot be found, or if the document is executed in the United Kingdom, it must be proved—

- (i) that the attestation of a witness is in his handwriting, and
- (ii) that the signature of the person executing the document is in the handwriting of that person (s. 69).

3. The admission of a party to an attested document of its execution by himself is sufficient proof of its execution as against him (s. 70).

4. If the attesting witness denies or does not recollect the execution of the document, the execution may be proved by other evidence (s. 71), i.e., it may be proved under ss. 69 and 70.

An attested document, not required by law to be attested, may be proved as if it was unattested (s. 72).

In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, proved to have been written or made by that person, may be compared with the one which is to be proved (s. 73).

Public documents.—These are (1) documents forming the acts or records of the acts—

- (i) of the sovereign authority,
- (ii) of official bodies and tribunals, and
- (iii) of public officers, legislative, judicial and executive, whether in India or other portions of His Majesty's Dominions, or a foreign country.

(2) Public records kept in India of private documents (s. 74).

All other documents are private (s. 75).

Certified copies of public documents will be given by every public officer having the custody of them on payment of legal fees (s. 76). Such copies may be produced in proof of the contents of the public documents of which they purport to be copies (s. 77). Certain public documents are proved in special ways, and not by certified copies. These are Acts or Notifications of the Central Government or of the Crown Representative, or of any Provincial Government; proceedings of the Legislatures; proclamations issued by His Majesty or by the Privy Council; Acts or proceedings of the Legislatures of a foreign country. As to how they are to be proved see s. 78.

Presumption as to documents.—Sections 79-85 and s. 89 provide for cases in which the Court *shall* presume to be genuine certain facts about documents, that is, the Court is bound to accept those facts as proved until they are disproved.

1. As to a certified copy or other document which is declared by law to be admissible as proof of any fact, and which purports to be certified by an officer of the Central Government or Provincial Government or by an officer in an Acceding State or other Indian State who is duly authorised by the Central Government or by any authorized officer in any Indian State.

The Court shall presume that it is genuine. It shall also presume that the officer who signed or certified it held at the time the official character which he claims in it (s. 79).

2. As to (1) a record of evidence in a judicial proceeding, or

(2) a confession taken in accordance with law and purporting to be signed by a Judge or Magistrate or other officer authorized by law.

The Court shall presume (i) that the document is genuine ;

(ii) that any statement as to the circumstances under which it was taken is true ; and

(iii) such evidence or confession was duly taken (s. 80).

3. As to the London Gazette, or any official Gazette or the Government Gazette of any colony, dependency or possession of the British Crown or a newspaper, or a private Act of Parliament printed by the King's Printer, or a document coming from proper authority, the Court shall presume that it is genuine (s. 81).

4. As to a document which would be admissible in an English or Irish Court without proof of (a) its seal or stamp or signature, or

(b) the official character of the person signing it, the Court shall presume (i) that the seal, etc., is genuine, and

(ii) that the person signing it held that official position which he claims in it (s. 82).

5. As to maps or plans purporting to be made by the authority of Central Government or Provincial Government.

The Court shall presume that they were so made and are accurate (s. 83).

6. As to (1) authorized law-books containing laws of any country and

(2) books purporting to contain reports of decisions of Courts of such country,

the Court shall presume that they are genuine (s. 84).

7. As to powers-of-attorney executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or representative of the Central Government,

the Court shall presume that they were so executed and authenticated (s. 85).

8. As to a document called for and not produced after notice to produce,

the Court shall presume that it was duly attested, stamped and executed (s. 89).

Sections 86-88 and 90 provide for cases in which the Court *may* presume certain facts about documents, that is, the Court is at liberty to accept those facts as proved until they are disproved, or to call for proof of them in the first instance.

1. As to a certified copy of any judicial record of a foreign country, certified by a representative of Her Majesty or of the Central Government,

the Court may presume that it is genuine and accurate (s. 86).

2. As to (1) any book to which the Court may refer on a matter of public or general interest, and

(2) any published chart or map produced for its inspection, the Court may presume that it was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published (s. 87).

3. As to a message forwarded from a telegraph office, the Court may presume that it corresponds with the message for transmission at the office from which it purports to be sent.

But it shall not make any presumption as to the person by whom such message was delivered for transmission (s. 88).

4. As to a document proved to be **thirty years old** and produced from proper custody, the Court may presume

(i) that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and

(ii) that it was duly executed and attested by the person by whom it purports to be executed and attested (s. 90).

Documents are in proper custody if they are (i) in the place in which, and (ii) under the care of the person with whom, they would naturally be (*ibid.*).

Chapter VI.—Exclusion of oral by documentary evidence.—

When (i) the terms of a contract, grant, or other disposition of property have been reduced to the form of a document, or

(ii) any matter is required by law to be in the form of a document—

(I) no evidence shall be given of the terms of (a) such contract, grant, or disposition of property, or (b) of such matter, except (i) the document itself or

(ii) secondary evidence of its contents in cases in which secondary evidence would be admissible (s. 91);

(II) no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of (i) contradicting, (ii) varying, (iii) adding to, or (iv) subtracting from, its terms (s. 92).

To rule (I) there are two exceptions :—

(1) When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved (s. 91, Excep. 1).

(2) Wills admitted to probate in British India may be proved by the probate (s. 91, Excep. 2).

* The statement, in any document, of a fact other than the terms of a contract, grant or disposition of property, or which is not required by law to be in writing, does not preclude proof of such fact by any other means (*Ibid.*, Explan. 3).

To rule (II) there are six exceptions. Oral evidence is admissible in the following cases :—

(1) Any fact which would (i) invalidate any document, or (ii) entitle any person to any decree or order relating thereto, may be proved, i.e., fraud, intimidation, illegality, failure of consideration, mistake in fact or law.

(2) Any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with its terms, may be proved.

(3) Any separate oral agreement, constituting a condition precedent to the attaching of any obligation under the document, may be proved.

(4) A subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except where such contract or grant is required to be in writing, or has been registered.

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are not inconsistent with its express terms.

(6) Any fact which shows in what manner the language of the document is related to existing facts may be proved.

Persons who are not parties to a document or their representatives in interest may give evidence of facts tending to show a contemporaneous agreement varying the terms of the document (s. 99).

Construction of documents.—Latent and patent ambiguities.—Sections 90-100 embody the rules as to the admissibility of extraneous evidence to interpret documents. Such evidence is inadmissible in the following cases.—

1. When the language is, on its face, ambiguous or defective, evidence cannot be given of facts which would show its meaning or supply its defects (s. 93).

2. When the language is plain in itself, and when it applies accurately to existing facts, evidence cannot be given to show that it was not meant to apply to such facts (s. 94).

Such evidence is admissible in the following cases.—

1. When the language is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense (s. 95).

2. When the language is meant to apply to any one, but not to more than one, of several persons or things, evidence may be given to show to which of those persons or things it was intended to apply (s. 96).

3. When the language applies partly to one set of facts and partly to another, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply (s. 97).

4. Evidence may be given as to the meaning of illegible, foreign, obsolete, technical, local and provincial expressions, abbreviations and words used in a peculiar sense (s. 98).

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

This Part deals with the production and effect of evidence. It comprises—

- (a) the question of burden of proof;
- (b) the rules as to who is to give evidence and under what circumstances;
- (c) the rules as to examination of witnesses; and
- (d) the effect of improper reception or rejection of evidence.

Chapter VII.—Burden of proof.—Whoever desires any Court to give judgment as to any legal right or liability dependent on facts, which he asserts, must prove that those facts exist. The burden of proof lies on that person who is bound to prove any fact (s. 101). The burden of proof in a suit or proceeding lies on that person who would fail if no evidence were given on either side (s. 102).

Sections 103-113 lay down the rules as to burden of proof.—

1. The burden of proof as to any particular fact lies on that person who wishes the Court to believe it unless the law has provided that its proof shall lie on any particular person (s. 103).

2. The burden of proving any fact in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence (s. 104).

3. When a person is accused of an offence, the burden of proving that his case falls within any exception in the Penal Code or any other law lies on him (s. 105).

4. When a fact is especially within the knowledge of any person, the burden of proving it lies on him (s. 106).

5. When it is shown that a man was alive within thirty years, the burden of proving that he is dead is on the person who affirms it (s. 107).

6. When it is proved that a man has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive lies on the person who affirms it (s. 108).

7. When persons have acted as partners, or as landlord and tenant, or as principal and agent, the burden of proving that such relationship has ceased lies on the person who affirms it (s. 109).

8. When a person is in possession of any thing as owner, the burden of proving that he is not the owner is on the person who affirms that he is not the owner (s. 110).

9. When a person stands towards another in a position of active confidence, the burden of proving the good faith of any transaction between them lies on the person in active confidence (s. 111).

10. The fact that a person is born during a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, then unless non-access is proved, it shall be conclusive proof of his legitimacy (s. 112).

11. A notification in the *Gazette of India* of a cession of British territory before the commencement of Part III of the Government of India Act, 1935, to any Indian State is conclusive proof that a valid cession took place at the date mentioned in the notification (s. 113).

Three sections deal with 'conclusive proof' as defined in s. 4, viz., ss. 41, 112, and 113.

Section 114 lays down certain cases in which the Court may presume the existence of any fact which it thinks likely to have happened, regard being had (i) to the common course of natural events, (ii) human conduct, and (iii) public and private business, in their relation to the facts of the particular case (s. 114). See the section as to those cases.

Chapter VIII.—Estoppel.—When one person has by his (a) declaration, (b) act, or (c) omission,

(1) intentionally caused or permitted another person to believe a thing to be true, and

(2) to act upon such belief,

neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

The Evidence Act specially provides for the following estoppels—

1. A tenant of immovable property or person claiming through such tenant cannot, during the continuance of the tenancy, deny that the landlord had, at the beginning of the tenancy, a title to such property (s. 116).

2. A person, who came upon immovable property by the license of the person in possession thereof, cannot deny that the person so in possession had a title at the time when such license was given (*ibid.*).

3. An acceptor of a bill of exchange cannot deny that the drawer had authority to draw or endorse (s. 117).

But the acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn (*ibid.*, Explan. 1).

4. A bailee or licensee cannot deny that his bailor or licensor had, when the bailment or license commenced, authority to make such bailment or grant such license (*ibid.*). But if a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor if he is sued by the bailor (*ibid.*, Explan. 2).

Difference between estoppel and admission.—(1) Estoppel binds only parties and privies thereto. It cannot be taken advantage of by strangers. (2) Estoppel being a rule of evidence, an action cannot be founded on it. An action may be founded on an admission.

Difference between estoppel and res judicata.—(1) Estoppel is part of the law of evidence and proceeds upon the equitable principle of altered situation; *res judicata* belongs to procedure and is based on the principle that here must be an end to litigation.

(2) Estoppel prohibits a party from proving anything which contradicts the previous declarations or acts, to the prejudice of a party who, relying upon them, altered his position; *res judicata* prohibits the Court from enquiring into a matter already adjudicated.

(3) Estoppel shuts the mouth of a party; *res judicata* ousts the jurisdiction of the Court.

Difference between estoppel and presumption.—An estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving particular facts; where as a presumption is a rule that particular inferences shall be drawn from particular facts, whoever proves them. Estoppel is that species of presumption where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done.

Chapter IX.—Witnesses.—All persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, (a) by tender years, (b) extreme old age, or (c) disease (s. 118). No particular number of witnesses is required for the proof of any fact (s. 125).

Dumb witnesses.—A witness who is unable to speak may give his evidence in any manner in which he can make it intelligible, e.g., by writing or signs. Such writing must be written and the signs made in open Court (s. 119).

Husband and wife.—Husband or wife (i) of any party to a civil suit, or (ii) of the accused in criminal proceedings, is a competent witness (s. 120).

Privileged communications.—Certain witnesses cannot be compelled to disclose certain facts. The law excludes this evidence on the ground of public policy.

1. **Judge and Magistrate.**—A Judge or Magistrate cannot, except on the special order of some Court to which he is subordinate, be compelled to answer any question,

(i) as to his own conduct, or

(ii) as to anything which came to his knowledge, as such Judge or Magistrate.

He may be examined as to matters which occurred in his presence while he was so acting (s. 121).

2. **Communications during marriage.**—A person cannot be compelled to disclose any communications made to him or her during marriage by any person to whom he or she is or has been married. He will not be permitted to disclose any such communication unless the person who made it or his representative in interest consents—except

- (i) in suits between married persons, or
- (ii) in proceedings in which one married person is prosecuted for a crime against the other (s. 122).

3. *Affairs of State*.—No person can give evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned (s. 123).

4. *Official communications*.—No public officer can be compelled to disclose communications made to him in official confidence, if public interest would suffer by the disclosure (s. 124).

5. *Information as to crime*.—A Magistrate or a police or revenue officer cannot be compelled to say whence he got any information as to the commission of an offence (s. 125).

6. *Professional communications*.—A barrister, attorney, pleader, or vakil, cannot disclose, without the client's consent,

- (i) any communication made to him in the course and for the purpose of his employment ;

- (ii) the contents or condition of any document with which he became acquainted in the course and for the purpose of his employment, or

- (iii) any advice given by him to his client (s. 126).

Such protection from disclosure does not extend to—

- (i) any communication made in furtherance of any illegal purpose ;

- (ii) any fact observed by a barrister, attorney, pleader, or vakil in the course of his employment, showing that a crime or fraud has been committed, since the commencement of his employment.

The principle of non-disclosure of professional communications applies to the clerks or servants of barristers, attorneys, pleaders, or vakils (s. 127).

If a party to a suit gives evidence *at his own instance* he is not to be deemed thereby to have consented to a disclosure of professional communications by his legal adviser ; and if he calls any barrister, attorney, pleader, or vakil, as a witness he is only deemed to have consented to such disclosure if he questions him regarding it (s. 128). A person cannot be compelled to disclose any confidential communication which has taken place between him and his legal adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as the Court thinks necessary, in order to explain any evidence he has given (s. 129).

Production of documents by witness.—A witness who is not a party to a suit cannot be compelled to produce

- (1) his title-deeds or any documents which might tend to criminate him unless he has agreed in writing to produce them (s. 130) ;

- (2) documents in his possession which any other person would be entitled to refuse to produce if they were in his possession (s. 131).

Criminating questions to a witness.—A witness cannot be excused from answering any relevant question upon the ground that the answer will tend (i) to criminate him, or

(ii) to expose him to a penalty of forfeiture. But such answer cannot

(a) subject him to arrest or prosecution, or

(b) be proved against him in any criminal proceedings except a prosecution for giving false evidence (s. 132).

Accomplice.—Illustration (b) to s. 114 says that an accomplice is unworthy of credit unless he is corroborated in material particulars. Section 133 provides that an accomplice shall be a competent witness against an accused; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice (s. 133). See Comment on p. 263 on this topic.

Chapter X.—Examination of witnesses.—The order of production and examination of witnesses is regulated by the Civil and Criminal Procedure Codes or by the discretion of the Court (s. 135). The Judge may ask how a particular fact is relevant and admit the evidence if he thinks the fact would be relevant. If the relevancy of a fact depends on proof of some other fact, such latter fact must be proved first unless the party undertakes to prove it subsequently and the Court is satisfied with such undertaking (s. 136).

The examination of a witness by the party who calls him is called examination-in-chief.

The examination of a witness by the adverse party is called cross-examination.

The examination of a witness subsequent to the cross-examination by the party who called him, is called re-examination (s. 137).

Witnesses are first examined-in-chief, then cross-examined, and then re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. The re-examination must be directed to the explanation of matters referred to in cross-examination. If new matter is introduced in re-examination, the adverse party may further cross-examine upon that matter (s. 138).

A person summoned to produce a document does not become a witness and cannot be cross-examined unless he is called as a witness (s. 139).

Witnesses to character may be cross-examined and re-examined (s. 140).

The Court may permit the person who calls a witness to put any questions to him, which might be put in cross-examination by the adverse party (s. 154). This is only allowed if the witness proves to be a 'hostile witness', i.e., one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the Court.

Leading questions.—Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question (s. 141). Such questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with the permission of the Court (s. 142).

The Court will permit such questions—

- (1) as to matters which are (i) introductory, or (ii) undisputed, or (iii) already sufficiently proved (s. 142), or
- (2) in cross-examination (s. 143).

Evidence as to matters in writing.—Section 14 enables the parties to put in force the provisions of ss. 91 and 92. Any witness may be asked whether any (a) contract, (b) grant, or (c) other disposition of property, as to which he is giving evidence, was not in writing, and if he says that it was, the adverse party may object to such evidence being given until the document is produced or facts proved for the admission of secondary evidence. The same principle applies if a witness is about to make any statement as to the contents of a document, which, in the opinion of the Court, ought to be produced (s. 144).

A witness may be cross-examined as to previous statements made by him and reduced into writing, without such writing being shown to him or proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him (s. 145).

Questions lawful in cross-examination.—When a witness is cross-examined he may be asked any questions which tend—

- (1) to test his veracity;
- (2) to discover who he is and what is his position in life; or
- (3) to shake his credit by injuring his character, although the answer to such questions might criminate him or expose him to a penalty or forfeiture (s. 146).

Questions as to character.—If a question in cross-examination is irrelevant, except in so far as it affects the credit of the witness by injuring his character, the Court may compel the witness to answer it or warn him that he is not obliged to answer it. The Court in deciding whether a particular question is proper or not will have regard to the following considerations:—

(1) Such questions are *proper* if the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness.

(2) Such questions are *improper*—

(i) if the imputation which they convey relates to matters so remote in time, or of such character, that it would not affect, or affect in a slight degree, the opinion of the Court as to the credibility of the witness;

(ii) if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence (s. 148).

Such questions ought not to be asked unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded (s. 149). If the Court thinks that any question was asked without reasonable grounds, it may, if it was asked by any barrister, attorney, pleader, or vakil, report his conduct to the High Court or other authority to which he is subordinate (s. 150).

The Court may draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable (s. 148).

Questions that will be forbidden by the Court.—The Court will forbid

(1) any question which it regards as indecent or scandalous unless it refers to facts in issue or to matters necessary to be known in order to determine the facts in issue (s. 151);

(2) any question which appears to the Court (i) to be intended to insult or annoy, or (ii) to be offensive in form (s. 152).

Answer to questions as to character cannot be contradicted.—When a witness answers any question which is relevant in so far as it shakes his credit, no evidence can be given to contradict him; but if he answers falsely he may be charged with giving false evidence (s. 153). Evidence, however, may be given (i) of previous conviction if a witness denies it, or (ii) of facts tending to impeach his impartiality if he denies them (s. 153, Explan.).

Impeaching the credit of witness.—The credit of a witness may be impeached by the adverse party, or, with the consent of the Court, by the party who calls him, in the following ways:—

(1) By the evidence of persons who testify that they believe him to be unworthy of credit.

(2) By proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give evidence.

(3) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

(4) When a man is prosecuted for rape or attempt to ravish, it may be shown that the prosecutrix was of generally immoral character (s. 155).

Evidence in corroboration.—When a witness whom it is intended to corroborate gives evidence of a relevant fact—

(i) he may be questioned as to the circumstances which he observed at or near to the time or place at which such relevant fact occurred (s. 156).

(ii) any former statement made by such witness relating to the

same fact at or about the time when the fact took place, or before any authority competent to investigate the fact, may be proved (s. 157).

When a statement relevant under s. 32 or 33 is proved, evidence may be given

- (1) to contradict or corroborate it, or
- (2) to impeach or confirm the credit of the person by whom it was made, as if he had been called as a witness and had denied upon cross-examination the truth of the matter suggested (s. 158).

Refreshing memory.—A witness may refresh his memory by referring to

- (1) any writing made by himself
 - (i) at the time of the transaction concerning which he is questioned, or
 - (ii) so soon afterwards that the transaction was fresh in his memory ;
- (2) any such writing made by another person and read by the witness and known by him to be correct, while his memory, was still fresh ;
- (3) professional treatises if he is an expert.

A witness may, with the Court's permission, refer to a copy of any document to which he might refer if it were produced, provided there is sufficient reason for the non-production of the original (s. 159). He may also testify to facts mentioned in any such document, although he has no recollection of them, if he is sure that the facts were correctly recorded in the document (s. 160). Any document to refresh memory must be shown to the adverse party, who may, if he pleases, cross-examine the witness upon it (s. 161).

Production of document by witness.—A witness summoned to produce a document must, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or admissibility. The validity of such objection will be decided by the Court. The Court may inspect the document unless it refers to matters of State or take evidence to determine on its admissibility (s. 162).

Notice to produce document.—Notice to produce a document is necessary, except in the six cases provided in s. 66, in order to make secondary evidence of its contents admissible. When a party gives notice to produce a document, and it is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so (s. 163). If a party refuses to produce a document after notice, he cannot use it as evidence (i) without the consent of the other party, or (ii) the order of the Court (s. 164).

Court's power to put questions.—The Judge may, in order to ascertain relevant facts,

(1) ask any question (*a*) at any time, (*b*) of any witness or parties, (*c*) about relevant or irrelevant facts—though the judgment must be based on relevant facts only ;

(2) order the production of any document or thing.

The parties cannot object to this course, nor can they cross-examine a witness upon any answer given in reply.

The Judge, however, cannot

(1) compel a witness to answer a question or produce a document which such witness would be entitled to refuse to answer to produce under ss. 121 to 132 at the instance of the adverse party ;

(2) ask any question as to credit which it would be improper for any other person to ask under s. 148 or 149 ;

(3) dispense with primary evidence of any document, except where secondary evidence is admissible (s. 165).

Power of jury to put questions.—A juror or assessor may put any question to a witness, through or by leave of the Judge, which the Judge might put and which he considers proper (s. 166).

Chapter XI.—Improper admission or rejection of evidence.—

The improper admission or rejection of evidence is not a ground

(1) for a reversal of the judgment, or

(2) for a new trial of the case,
if the Court thinks

(i) that independently of the evidence admitted, there was sufficient evidence to justify the decision, or

(ii) that if the rejected evidence had been received it ought not to have varied the decision (s. 167).

APPENDIX.

QUESTIONS.

PART I.

CHAPTER I.—PRELIMINARY.

1. Explain briefly the structure of the Indian Evidence Act. What do you understand by Lord Brougham's observation "that the law of evidence is the *lex fori* which governs the Court"? See Comment on s. 1, p. 3.

2. Write a short note on the necessity and utility of rules of judicial evidence. See Summary, p. 308.

3. "Rules of evidence are fetters on justice". Comment on this.

4. To what extent are the provisions of the Indian Evidence Act applicable to (a) affidavits presented to any Court, (b) proceedings before an arbitrator, (c) proceedings before a Court-martial? See s. 1, and Comment thereon.

5. State some of the more important provisions of the law of evidence which are peculiar to criminal trials and inapplicable to the trial of civil cases.

See sections relating to confessions and character.

Is there any difference as to the effect of evidence in civil and criminal proceedings? See Comment, p. 9.

"The rules of evidence are in general the same in civil and criminal proceedings". Mention any three exceptions to the above statement.

Ans.—The provisions relating to confession, dying declaration, character, and incompetency of parties as witnesses in certain cases, are peculiar to criminal law. The rules of evidence may be relaxed by consent of parties in civil matters, but not in criminal. In civil proceedings facts in issue are proved by preponderance of evidence. In criminal proceedings they must be proved beyond doubt. See Comment, p. 9.

8. Define 'Court', 'Fact', 'Relevant fact', 'Fact in issue', 'Issue of fact', 'Document', 'Evidence', 'Proved', 'Disproved'. See s. 3.

9. When is a fact said to be 'proved', and when is it said to be 'disproved'.

10. Distinguish between a 'relevant fact' and a 'fact in issue'.

11. Distinguish between evidence and proof. See Comment, p. 7.

12. When is a fact said to be relevant to another?

13. What is meant by the expression 'relevancy' as referring to the admissibility of evidence in judicial inquiries? See Comment, p. 5.

14. What do you mean by presumption? See s. 4.

What do you understand by 'may presume', 'shall presume', and 'conclusive proof'? See s. 4.

15. Is there any difference between presumption of law and presumption of fact? See Comment, p. 11.

16. What do you understand by conclusive proof? Give some illustrations when one fact is conclusive proof of another. See ss. 4, 41, 112 and 113.

CHAPTER II.—RELEVANCY OF FACTS.

17. What is a "relevant fact"? See s. 6.
18. Write a short note on *res gestæ*. See Comment on s. 6.
19. Under how many and what headings are 'relevant facts' arranged in the Act? See the tabular statement on p. 309.
20. When, and to what extent, is the conduct of a party to a proceeding relevant? See s. 8.
21. Discuss the law of conspiracy as laid down in the Evidence Act. See s. 10.
22. When do facts not otherwise relevant become relevant? Give illustration. See s. 11.
23. Explain how evidence of *alibi* becomes relevant. See Comment on s. 11.
24. Give two illustrations of facts which may be relevant under s. 11 only and not under any other section of the Evidence Act. See ills. to s. 11.
25. What is the necessity for s. 11 of the Evidence Act? Does it not apparently make all facts relevant? See Comment on s. 11, p. 26.
26. "Evidence must be confined to the matters in issue". State briefly the exceptions to this rule. Sections 6 to 11 are the exceptions.
27. What facts are relevant in a suit in which damages are claimed? See s. 12.
28. What facts are relevant when the existence of a right or custom is in question? See s. 13.
29. Discuss whether a judgment not *inter partes* is admissible against a third party. See Comment, p. 32.
30. Discuss—"Evidence of the accused having committed crimes other than that with which he is charged is not admitted." See Comment on s. 14.
31. The fact of a person having once or many times in his life done a particular act in a particular way does not make it more probable that he has done the same thing in the same way upon another and different occasion. See Comment on s. 14.
32. State when facts showing the existence of any state of mind or of body or bodily feeling are relevant evidence. Give apt examples to illustrate your answer. See s. 14 and its illustrations.
33. When is the previous conviction of an accused relevant? See s. 14, Explan. 2.
34. What facts are relevant when the question is whether an act was accidental or intentional? See s. 15.
35. State the principal classes of facts which are declared to be relevant by the Evidence Act. See Summary, p. 310.
36. "Relevancy and admissibility are not co-extensive terms". Give instances of and reasons for this rule. See Summary, p. 311.
37. Define a *statement* and an *admission*. Under what circumstances, and for what purposes, are statements and admissions made by persons (whether parties to the suit or not), who are not called as witnesses, admissible in evidence? See ss. 17-21.
38. What are "admissions"? Who can make them, and when can they be used by and on behalf of persons making them? What is the evidentiary value of an admission? See ss. 17, 18, 21 and 31.
39. Comment on the following.—"Admissions cannot be proved by or on behalf of the person who makes them." See s. 21, Exceptions.

40. Comment on the following.—“Oral admission as to contents of a document are not relevant.” See s. 22.

41. When are oral admissions as to contents of documents relevant? See s. 22.

42. Under what circumstances is an admission in a civil case irrelevant? See s. 23.

43. When can documents marked “without prejudice” be admissible in evidence? See Comment on s. 23.

44. State the provisions of the Indian Evidence Act as to confessions. See ss. 24-30.

45. Distinguish between an ‘admission’ and a ‘confession’ and state the rules regarding the admissibility and probative value of each. See Comment on s. 24, p. 56.

46. What are the provisions embodied in the Evidence Act regarding confessions? See ss. 24, 25, 26, 27, 28, 29, 30.

47. What confessions cannot be proved against an accused person? See ss. 24, 25, 26.

48. Discuss the safeguards which the Legislature has provided in order to make a confession admissible. See ss. 24, 25, 26.

49. Can a confession made to a police-officer be proved as against an accused person? See s. 25.

50. When and to what extent are statements made by the accused to a police-officer admissible? See ss. 26, 27.

51. What evidentiary value will you assign to retracted confessions? See Comment, p. 80.

52. In what cases, if any, can the confession of an accused person be used against a co-accused? See s. 30.

53. How far such confession may be taken into consideration in convicting the accused? See Comment, p. 75.

54. State the law regarding the relevancy or otherwise of confessions against the person making them. See s. 30.

55. Comment on the following.—“Admissions are not conclusive proof of the matters admitted, but they may operate as estoppel.” See s. 31.

56. State the cases in which statements of persons who cannot be called as witnesses are relevant. See s. 32.

57. “Evidence may be given of statements made by a person who is not actually called before the Court.” Give two illustrations. See s. 32.

58. What is a dying declaration? Enumerate the grounds on which dying declarations are admitted in evidence. If a person making a dying declaration happens to live, can the declaration be admitted in evidence? See Comment on s. 32(1).

59. What is the difference between the English law and the Indian law on the subject of dying declaration? See Comment, p. 89.

60. Give illustration of cases in which statements made by deceased persons are allowed to be received in evidence. See s. 32, cl. (1).

61. Are entries in books of account alone sufficient to charge any person with liability? When do they require corroboration as a matter of law, and when not? See s. 32, Comment, p. 91.

62. In what cases and under what conditions is a verbal statement of opinion by a deceased person admissible as relevant to prove an allegation of a public right or custom? See s. 32, cl. (4).

63. Enumerate the cases in which evidence not taken by the Court trying the case can be put in? See s. 33.

64. When is evidence given by a witness in judicial proceeding relevant in a subsequent judicial proceeding? See s. 33.

65. Under what circumstances is a deposition of an absent witness admissible? See s. 33.

66. Give some exceptions to the rule excluding hearsay evidence. See ss. 32 and 33.

67. What are the conditions under which an entry in an official book or register stating a fact in issue becomes a relevant fact? What is the evidentiary value of the entry in a man's account-book in support of his claim? See ss. 34, 35.

68. Are entries in books of account alone sufficient to charge any person with liability? When do they require corroboration as a matter of law and when not? See Comment on s. 34.

69. State briefly the provision of the Evidence Act with reference to (a) maps, plans or charts, and (b) finger impressions. See ss. 36, 45, and 83.

70. *Nemo debet bis vexari upro una et eadem causa*. How is the principle expressed by this maxim discussed in the Indian Evidence Act? See s. 40.

71. How far, under what circumstances, and for what purposes, can previous judgments, orders and decrees be deemed relevant? See ss. 40-43.

72. *Res inter alios actæ* are generally irrelevant. State the exceptions to the rule. See ss. 11, 14, 40-43.

73. In what cases are judgments not *inter partes* admissible in evidence? See ss. 41-43.

74. Describe and distinguish the legal effect of judgments declared to be conclusive in subsequent trials by the Evidence Act. See s. 41.

75. Distinguish between a "judgment *in rem*" and a "judgment *in personam*" for the purposes of the Indian Evidence Act. Discuss the admissibility and effect of such judgments respectively as evidence. See Comment on s. 41.

76. Which judgments alone are to have a conclusive character? See s. 41.

77. Is the judgment of a Court refusing probate a judgment *in rem*? If so, why? If not, why not? See s. 41.

78. State in what cases, if any, and under what provisions of the Evidence Act, are judgments relevant, when such judgments are neither judgments *in rem* nor admissible under the rule of *res judicata*. What is the probative value of such judgments? See s. 42 and Comment thereon.

79. In what cases are the acts of third persons admitted as evidence of a transaction? Give instances. See ss. 10, 32, 41-43.

80. Can transactions between third parties ever be relevant for or against parties to a suit? If so, when? Illustrate your answer by an example. State the general law on the subject. See ss. 13, 14 and 42.

81. State the cases in which previous convictions of an accused are admitted in evidence. See ss. 8, 14 and 43.

82. State upon what subjects the opinions of witnesses are admissible in evidence. See ss. 45-51.

83. State the exceptions to the rule that opinion evidence is not admissible in evidence. See ss. 45-51.

84. How is a fact in reference to such opinion relevant when it is not otherwise relevant? See s. 46.

85. Distinguish between :—(a) expert evidence and ordinary evidence :

(b) ambiguity and inaccuracy. See (a) s. 45; (b) s. 98.

86. When are the opinions of persons who are strangers to a proceeding relevant under the Evidence Act? What is the probative value of such evidence? See ss. 45 and 51.

87. How is a fact in reference to expert opinion relevant when it is not otherwise relevant? See s. 46.

88. What facts are relevant when any right or custom is in question? See s. 48.

89. What qualifications must a witness, speaking as to relationship, possess? See s. 50.

90. What are the rules with regard to the reception of evidence of character of (1) a witness, and (2) a party? See ss. 52-55 and 32, cl. (5).

91. How far is 'character' relevant and admissible in evidence in (a) civil suits, (b) criminal cases. See ss. 52-55. Does the term 'character' in the Evidence Act differ from that given in English law? See Comment on s. 55.

92. Discuss "In criminal proceedings, the fact that the accused person has a bad character is irrelevant." See s. 53.

PART II.—ON PROOF.

CHAPTER III.—FACTS WHICH NEED NOT BE PROVED.

93. Are there any facts which though relevant need not be proved? See s. 56, 58.

94. Classify the facts of which judicial notice is taken without formal proof. See s. 57.

95. What is meant by "the rule of the road on land or at sea"?

Ans.—This means the rule that horses and vehicles of all descriptions should keep to the left side of the road. At sea, the rule is that ships and steam-boats, on meeting, should port their helms, so as to pass on the (port) left side of each other; steam-boats should keep out of the way of sailing ships; and every vessel overtaking another should keep out of its way.

CHAPTER IV.—ORAL EVIDENCE.

96. Explain fully the rule that oral evidence must, in all cases, be direct. Is there any exception to the rule? Illustrate your answer by concrete examples. See s. 60.

97. State how opinions of experts may be ascertained. See s. 60, cl. (4).

98. "In determining the admissibility of evidence, the production of the best evidence should be exacted." Discuss the above proposition. See s. 60.

99. What is the meaning of 'hearsay evidence'? What are the reasons for not admitting 'hearsay' as evidence? See Comment on s. 60, p. 137.

CHAPTER V.—DOCUMENTARY EVIDENCE.

100. What is meant by proving a document? See s. 61.

101. What is 'primary evidence'? See s. 62.

102. Comment on the following.—"Where a document is executed in counterparts each counter-part is primary evidence as against the parties executing it." See Comment on s. 62.

103. How may the contents of a document be proved? What is meant by
L. E.—22.

secondary 'evidence'? State the general rules governing its admissibility. See ss. 61, 63.

104. When is a copy of a copy secondary evidence? See Comment on cl. (3) of s. 63.

105. Mention all the cases in which secondary evidence of the existence, condition or contents of a document may be given. See s. 65.

106. When is a party entitled to give secondary evidence of a document without calling on the party in possession of the same to produce it? See s. 66.

State the cases in which notice to produce need not be given to render secondary evidence of the contents of a document admissible. See s. 66.

107. What is meant by an attesting witness? See Comment on s. 68.

108. How will you use in evidence a document required by law to be attested? See s. 68.

109. How is such document to be proved if the attesting witness is dead or denies attestation? See s. 71.

110. When the genuineness of a letter is in dispute what are the various kinds of evidence that may be laid before the Court to prove the handwriting? See ss. 45, 47, 67 and 73.

111. What are 'public documents' and what are 'private documents' according to the Indian Evidence Act? See ss. 74, 75.

How are 'public documents' proved? See s. 78.

How may the judgment of a foreign tribunal be proved in British India? See s. 74(6).

112. Give five instances of (a) rebuttable, (b) irrebuttable presumptions from the Indian Evidence Act. See ss. 79-85.

113. Give a brief analysis of the documents which the Court is bound to presume to be genuine or accurate. See ss. 79, 85 and 89.

114. What facts can the Court presume with regard to a document produced before a Court purporting to be a confession made by an accused person and signed by a Magistrate? See s. 80.

115. What facts can a Court presume with regard to a map or plan purporting to be made by the authority of Government? See s. 83.

What facts can a Court presume without proof with regard to any published map or chart, the statements of which are relevant facts and which are produced for the Court's inspection? See s. 87.

116. State the provisions of the Evidence Act with reference to telegraphic message. See s. 88.

117. What is the nature of presumption as to a document called for and not produced without sufficient cause after notice to produce it? See s. 89.

118. How should ancient documents be proved? See s. 90.

119. "Documents thirty years old are said to prove themselves." Explain its meaning and application. See s. 90.

120. Explain 'ancient document', 'proper custody'. See Comment on s. 90.

CHAPTER VI.—EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

121. Discuss.—"What is in writing shall only be proved by the writing itself". Are there any exceptions to this rule? See s. 91.

122. What are the provisions to the general rule enacted by the Evidence Act excluding evidence of oral agreements or statements in the case of written contracts, grants, and dispositions of property, and matters required by law to be

reduced to the form of a document? See ss. 91 and 92.

123. State the exceptions to the rule that no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from, the terms of a written instrument. See ss. 92 and 99.

124. When the terms of a contract have been reduced to writing, can oral evidence be given for construing the contract or ascertaining the intention of the parties to it? Give reasons for your answer. See Comment on s. 92.

125. How far is evidence of intention and subsequent conduct admissible to prove that a document in the form of a sale-deed is in reality a deed of mortgage? See Comment on s. 92, p. 182.

126. State the rules as to the exclusion and admission of evidence to explain or amend ambiguous documents. Explain and illustrate the maxim *falsa demonstratio non nocet*. See ss. 93-98.

127. In what cases is oral evidence admissible to explain the contents of a document? See ss. 93-98.

128. Explain the distinction between 'patent ambiguity' and 'latent ambiguity' in a document. See Comment on s. 93.

PART III.—PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.—BURDEN OF PROOF.

129. What is "burden of proof"? Give the rules by which it is regulated. See ss. 101-111.

130. What are the general principles regulating the burden of proof? Illustrate your answer by examples. See ss. 101-111.

131. Upon whom does the burden of proof as a general rule lie? What are its exceptions? See ss. 102-111.

132. Enumerate the instances in which the burden of proof is determined in particular cases not by the relation of the parties but by presumptions. See ss. 107-111.

133. Discuss the rule of presumption as given in the Evidence Act when the question is as to the death of a person known to have been alive within thirty years and also of a person who has not been heard of for seven years. See ss. 107 and 108.

134. State shortly the rules of the Indian Evidence Act, as to burden of proof, in the following matters.—(a) Whether a man is alive or dead; (b) partnership; (c) tenancy; (d) principal and agent; (e) ownership; (f) legitimacy. See ss. 107-8, 109, 110 and 112.

135. State the nature of the evidence which can be led, under the Indian Evidence Act, to show that a person born during the continuance of a valid marriage between his parents is not legitimate. See s. 112.

136. Give instances of facts which are declared by law to be conclusive proof. See ss. 41, 112 and 113.

137. State fully the subject of presumptions as dealt with in the Indian Evidence Act. See ss. 79-99 and 112 and 113.

138. Comment on the following.—"A notification in the Gazette of India that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification." See Comment on s. 113.

139. Mention the principal presumptions, derived from the common course

of things, and give illustrations to show how such presumptions may be explained away in particular cases. See s. 114 and illustrations.

✓ CHAPTER VIII.—ESTOPPEL.

140. Explain the doctrine of estoppel. What cases of estoppel by conduct are provided by the Evidence Act? See s. 115, and Comment on p. 229.

141. Discuss the principle upon which the rule of estoppel as laid down in the Evidence Act rests. See Comment, p. 229.

142. Is intention a necessary element in order that a person should be estopped? See Comment, p. 235.

143. What are the three classes of estoppel according to English law, and how many kinds of these are recognised in the Indian Evidence Act? See Comment on p. 231.

144. Distinguish 'estoppel' from 'presumption' and from 'admission'. See p. 230.

145. Distinguish between 'estoppel' and *res judicata*. See Comment, p. 230.

146. Does the doctrine of estoppel apply to minors? If so, under what circumstances and subject to what limitation? See Comment on p. 234.

147. How far is representation relating to a promise in future binding as an estoppel? See Comment on p. 235.

148. Can mere silence ever amount to an estoppel? See Comment on p. 232.

149. Discuss "A fraudulent intention is by no means necessary to create an estoppel". See Comment on p. 236.

150. How far and under what circumstances are tenants, bailees, and licensees permitted to deny the title of their landlord or licensor as the case may be? See ss. 116 and 117.

Can a tenant prove that his landlord's title has ceased? See Comment p. 243.

CHAPTER IX.—WITNESSES.

151. State the law relating to competency and compellability of witnesses. See ss. 118, 120 and 133.

152. What constitutes incompetency to give evidence? See s. 118.

153. Can a lunatic and a dumb person be a competent witness? See ss. 118, Expln., and 119.

154. When can a witness be allowed to answer questions in writing? See s. 119.

155. What are privileged communications? State the circumstances under which the privilege can be claimed. See ss. 120-131.

156. State in detail the circumstances under which the Indian Evidence Act excuses witnesses from answering questions put to them in Court. See ss. 121-130.

157. What communications are witnesses not permitted or compelled to disclose? Compare the English and Indian law as to the admissibility of wife's evidence for or against her husband in civil and criminal cases. See s. 122 and Comment thereon.

158. May a wife be compelled to give evidence against her husband in a civil or criminal case? See ss. 120 and 122.

159. What professional communications between a party and his legal adviser are protected from disclosure? See s. 126.

160. When are professional communications not protected? See s. 126, provisos (1) and (2).

161. When is a party said to have waived privilege? See s. 128.

162. What privileges, if any, can be claimed by the following persons if called as witnesses.—(1) Judges; (2) married persons; (3) policemen; (4) public officers and (5) legal advisers? See ss. 121, 122, 124, 125 and 126.

163. What questions would a witness (neither professional nor official) be justified in refusing to answer? See ss. 122, 130-132 and 148.

164. Section 133 of the Evidence Act says: "A conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice".

Illustration (b) to sec. 114 of the Evidence Act states:

"A Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars".

Reconcile the above two propositions. See Comment on these two sections.

165. State the Indian and English law in respect of legality of convicting an accused person on the uncorroborated testimony of an accomplice. Cite cases illustrating the principles laid down by the Bombay High Court on the subject. See Comment on ss. 114 and 133.

166. Compare the confession of a co-accused with the testimony of an accomplice. See Comment on pp. 79 and 263.

167. State the provision of the Evidence Act with reference to production of title deeds by a witness. See ss. 130, 131.

168. Can a witness be excused from answering any question upon the ground that the answers will criminate him? See s. 132.

169. Discuss the question of the quantity of evidence required for judicial decision in India in civil and criminal cases and compare the provision made in the Evidence Act with the English law on the subject. See s. 134 and Comment thereon.

CHAPTER X—EXAMINATION OF WITNESSES.

170. Explain 'examination-in-chief', 'cross-examination', and re-examination'. See s. 137.

171. What are the principal rules regarding the kinds of question that may be asked in examination-in-chief, cross-examination, and re-examination? See s. 138.

172. What is a 'Leading Question'? What difference in observed and allowed regarding the right of parties to a suit about putting 'leading questions' to a witness? See ss. 141-143.

173. What course should you, as a pleader, adopt, if you wished to discredit a witness, by showing that he had made a contradictory deposition in another suit? See ss. 145, 155, cl. (3).

174. What questions affecting the credit of a witness by injuring his character are respectively proper and improper? See s. 148.

175. Is it open to a party to discredit his own witnesses, or to put leading questions to them? See ss. 142, 143, 154 and 155.

176. State the rules regarding cross-examination of a witness by his previous statement. See s. 145.

177. For what purposes and at whose instance are former statements of a witness under examination admissible under the Evidence Act? See ss. 145, 157, 160 and 161.

178. What questions can be put in cross-examination? See ss. 146, 148.
179. Write a short note on cross-examination as to credit. See ss. 146, 147, 148, 149.
180. In what ways may the credit of a witness be impeached? See ss. 146, 153 and 155.
181. When can the Court compel a witness to answer the question intended to affect his credit by injuring his character? See s. 147.
182. When a witness is under examination, (a) what questions and inquiries may be forbidden, and (b) what questions must be forbidden by the Court? See ss. 148-152.
183. In a civil case are there restrictions on the question which may be asked in cross-examination? Has the Judge power to exclude any question? If so, in what cases? See ss. 148-150.
184. Under what circumstances can the Court interfere with the cross-examination of a witness? See ss. 148-152.
185. What provision is made in the Evidence Act to prevent an abuse of the privilege granted to a counsel to put discrediting questions to a witness in cross-examination? See ss. 140-150.
186. What evidence of a witness is liable to contradiction? See s. 153.
187. How far is it permissible to give evidence to contradict answers given by a witness to questions to test his veracity? See s. 153.
188. When may a party cross-examine his own witness? Explain 'hostile witness'. See s. 154 and Comment thereon.
189. Who can impeach the credit of a witness, and how? See s. 155.
190. Enumerate the circumstances under which *expert* opinion is relevant, and state how such opinion may be ascertained. See ss. 45, 46 and 159.
191. When may the previous statement of a witness be proved in order to corroborate his testimony? See s. 157.
192. Is there any and what means of discrediting the deposition of a witness in a prior judicial proceeding? See s. 158.
193. What is meant by a witness 'refreshing his memory'? What documents may be used for this purpose? What is the right of the adverse party as to any writing used to refresh memory? See ss. 159-161.
194. What are the powers of a Judge to put questions to a witness or order production of any document? See s. 165.
195. What is the object of the Legislature in so empowering the Judge? See Comment on s. 165.

CHAPTER XI.—IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

196. Comment on the following:—"The improper admission or rejection of evidence shall not be ground of itself for a new trial". See s. 167.
197. When can a Judge order a new trial on the ground that the provisions of the Indian Evidence Act have not been followed? See s. 167.

INDEX.

Abbreviations—

evidence to show meaning of, s. 98, p. 198.

Ability—

of witness, cross-examination directed to test, s. 146, p. 282.

Absence—

of circumstances, burden of proving, s. 105, p. 204.

presumption of death from, s. 107, p. 206.

Acceptor—

of bill of exchange, estoppel of, s. 117, p. 245.

Access—

between married persons bearing on legitimacy, s. 112, p. 214.

Accession—

of Sovereign of United Kingdom, judicially noticed, s. 57(5), p. 133.

to offices, etc., of Indian public office, judicially noticed, s. 57 (7), p. 133.

Accident—

facts showing, s. 15, p. 39.

Accomplice—

evidence of, s. 114, ill. (b), p. 218 ; s. 133, p. 262.

Account-books—

entries in, p. 91.

relevancy of, s. 34, p. 104.

Accused—

conduct of, relevant, s. 8, ill. (e), p. 17.

confession by, when irrelevant, s. 24, p. 54.

refusing to answer questions, s. 114, ill. (h), pp. 218, 228.

Acts—

accidental, s. 15, p. 39.

of conspirators, how far relevant, s. 10, p. 23.

Indian Legislature, relevancy of, s. 37, p. 108.

Parliament, how proved, s. 37, p. 108.

when judicially noticed, s. 57(2), p. 133.

presumption as to copies of private, s. 81, p. 161.

statements made in recitals of, s. 37, p. 108.

proof of, s. 78, p. 157.

Admiralty jurisdiction—

relevancy of certain judgments in, s. 41, p. 111.

Admissibility of evidence—

Judge to decide, s. 136, p. 268.

Admission—

- by co-defendants, s. 18, p. 46.
- counsel, pleader or attorney, p. 45.
- guardian *ad litem*, s. 18, p. 46.
- partner, s. 18, p. 46.
- party in representative character, s. 18, p. 46.
- party to proceedings or his agent, s. 18, p. 45.
- person interested in subject-matter of proceedings, s. 18, p. 47.
- person from whom interest derived, s. 18, p. 47.
- principal and surety, s. 18, p. 46.
- Crown bound by, p. 43.
- definition of, s. 17, p. 43.
- improper, of evidence, s. 167, p. 305.
- facts admitted need not be proved, s. 58, p. 135.
- made without prejudice, p. 53.
- not allowed, when there is condition that its evidence shall not be given, s. 23, p. 53.
- not conclusive proof, but may estop, s. 31, p. 83.
- of execution by party to attested document, s. 70, p. 152.
- proof of, against persons making it, s. 21, p. 49.
 - by or on behalf of persons making it, s. 21, p. 49.

Admitted facts—

- need not be proved, s. 58, p. 135.
- not conclusive proof, but may estop, s. 31, p. 83.
- of execution by party to attested document, s. 70, p. 152.
- proof of, against persons making them, s. 21, p. 49.
 - by or on behalf of persons making them, s. 21, p. 49.

Adoption—

- statement as to existence, s. 32(6), pp. 85, 97.

Advocates—

- names of, judicial notice of, s. 57(12), p. 132.

Affairs of State—

- admissibility of evidence of, s. 123, p. 252.

Affidavits—

- whether receivable in evidence, p. 3.

Affirms—

- he who, must prove, s. 101, p. 200.

Agent—

- admission by, s. 18, p. 45.
- burden of proof as to relationship of, s. 109, p. 208.
- conduct of, s. 8, p. 16.
- production of document by, s. 131, p. 260.

Agreement—

- contemporaneous, varying document, s. 99, p. 198.
- oral evidence to vary written, s. 92, p. 178.

Ambiguous document—

exclusion of evidence to explain, s. 93, p. 195.

Amount of damages—

relevancy of facts in, s. 12, p. 29.

Ancient documents—

presumption as to, s. 90, p. 165.

secondary evidence of, p. 167.

Annoying questions—

Court to forbid, s. 152, p. 287.

Appointments—

evidence of, s. 91, Excep. 1, p. 169.

to public offices, judicial notice of, s. 57(7), p. 133.

Arbitrators—

Act not applicable to proceedings before, s. 1, p. 3.

Art—

opinions of experts on points of, s. 45, p. 120.

Articles of War—

judicially noticed, s. 57(3), p. 132.

Assessors—

right of, to put questions, s. 166, p. 305.

Attested documents—

admission of execution by party, s. 70, p. 152.

presumption as to, s. 89, p. 164.

proof of, not required by law to be attested, s. 72, p. 153.

required by law to be attested, s. 68, p. 148 ; s. 70, p. 152.

Attesting witness—

denying execution of document, s. 71, p. 153.

when need not be called, s. 69, p. 152.

Attorney—

admissions of fact by, p. 45.

communications to, when privileged, s. 126, p. 256.

insulting questions put by, s. 150, p. 286.

name of, judicial notice of, s. 57(12), p. 133.

notice to produce documents, s. 66, p. 146.

Authentication—

of power-of-attorney, s. 85, p. 163.

Bad character—

not relevant in criminal proceedings, except in reply, s. 54, p. 129.

Bailee—

estoppel of, s. 117, p. 245.

Barristers—

communications to, when disclosable, s. 126, proviso, p. 256.

privileged, s. 126, p. 256.

insulting questions put by, without reasonable grounds, may be reported to High Court, s. 150, p. 286.

Benami transactions—

proof of, p. 180.

Bill of exchange—

estoppel of acceptor of, s. 117, p. 245.

presumption as to, s. 114, ill. (c), pp. 218, 224.

Birth—

during marriage, conclusive proof of legitimacy, s. 112, p. 214.

Bodily feeling—

facts showing existence of, s. 14, p. 34.

Books—

entries in, of account when relevant, s. 34, p. 104.

presumption as to, general, s. 87, p. 164.

of law, s. 84, p. 162.

reference to, by Courts, for judicial notice, s. 57, p. 133.

experts, s. 159, p. 297.

Bribe—

credit of witness impeached by showing, s. 155(2), p. 290.

British Consul—

certified copies by, s. 78, p. 157.

British territories—

judicially noticed, s. 57(10), p. 133.

proof of cession of, s. 113, p. 218.

Burden of proof—

as to benami transaction, p. 180.

death or otherwise of absent persons, ss. 107, 108, pp. 206, 207.

fact especially within knowledge, s. 106, p. 205.

fact to be proved to make evidence admissible, s. 104, p. 203.

good faith of transaction between persons in fiduciary relation, s. 111,
p. 212.

landlord and tenant, s. 109, p. 203.

ownership, s. 110, p. 209.

particular facts, s. 103, p. 203.

partners, s. 109, p. 203.

principal and agent, s. 109, p. 203.

he who affirms must prove, s. 101 p. 200.

on whom lies the general, s. 102, p. 201.

that case of accused is within exception of the Penal Code, s. 105, p. 204.

what is, s. 101, p. 200.

Business—

entries in books kept in course of, s. 34, p. 104.

existence of course of, s. 16, p. 42.

statement made in course of, s. 32, cl. (2), pp. 84, 90.

Bystanders—

statement of, p. 15.

Capacity—

want of, invalidating document, s. 92, proviso 1, pp. 178, 185.

Caricature—

- a document, s. 3, ill. p. 6.
- libel expressed in, s. 32, ill. (n), pp. 86, 99.

Certified copies—

- of foreign judicial records, s. 86, p. 163.
- public documents, s. 65, p. 142 ; s. 76, p. 157.
- presumption as to genuineness of, s. 79, p. 153.
- proof of documents, s. 77, p. 157.
- secondary evidence, s. 63, p. 140.
- what are, s. 76, p. 157.

Cession of territory—

- conclusive proof of, s. 113, p. 218.

Character—

- as affecting damages, s. 55, p. 130.
- cross-examination and re-examination of witnesses to, s. 140, p. 276.
- definition of, s. 55, Expln., p. 130.
- evidence of, in civil cases, s. 52, p. 127.
- criminal cases, s. 53, p. 128.
- previous bad character not relevant, s. 54, p. 129.

Charitable foundation—

- opinion as to constitution of, s. 49, p. 125.

Charts—

- presumption as to, s. 87, p. 164.
- relevancy of statements in, s. 86, p. 108.

Child—

- estoppel not to affect, p. 234.
- evidence of, s. 118, p. 246.

Clerk—

- communication to, of legal practitioners, s. 127, p. 259.

Clergymen—

- statement by, as to marriage, s. 32, ill. (f), p. 85.

Client—

- when compellable to disclose confidential communications, s. 128, p. 259.
- not so compellable, s. 129, p. 259.

Co-accused—

- confessions of, s. 30, p. 74.

Co-defendants—

- admissions by, p. 46.

Collusion—

- in obtaining judgment, s. 44, p. 117.

Comparison—

- of handwriting, signature, etc., s. 73, p. 154.

Competency of witnesses—

- s. 118, p. 246.

Complainant—

conduct of, how far relevant, s. 8, p. 16.

Compulsion of witnesses—

incriminating documents, s. 130, p. 260.

title-deeds, s. 130, p. 260.

to give criminating replies, ss. 147, 148, p. 282.

make criminating statements, s. 132, p. 261.

produce documents of others, s. 131, p. 260.

Conclusive proof—

admissions are not, s. 31, p. 83.

judgments, how far, s. 41, p. 111.

meaning of, s. 4, p. 11.

of cession of territory, s. 113, p. 218.

legitimacy, s. 112, p. 214.

Conduct—

accompanying admissions as to bodily state, s. 21, p. 49.

definition of, s. 8, Explan. 1, pp. 16, 19.

evidence of, for construing writing, p. 182.

how far material in construction of documents, p. 19.

relevant, s. 8, p. 16.

Confessions—

caused by inducement, threat or promise, s. 24, p. 54.

definition of, p. 55.

distinction between admission and, p. 56.

judicial and extra-judicial, p. 55.

made after removal of impression caused by inducement, threat or promise,
s. 28, p. 72.

made while in custody of police-officers, s. 26, p. 63.

to police-officers, s. 25, p. 60.

of co-accused, s. 30, p. 74.

presumption as to, s. 80, p. 159.

retracted, p. 80.

under promise of secrecy, s. 29, p. 73.

Confidence—

burden of proving good faith in cases of active, s. 111, p. 212.

Confidential communications—

barristers, attorneys, vakils, pleaders, s. 126, p. 256.

clerks of legal advisers, s. 127, p. 259.

husband and wife during coverture, s. 122, p. 251.

interpreters, s. 127, p. 259.

judges, magistrates, s. 121, p. 259.

mukhtears, p. 258.

or professional communications as to affairs of State, s. 123, p. 252.

Consideration—

want of failure of, invalidating document, s. 92, proviso 1, pp. 178, 185.

Conspiracy—

agreement, but not direct meeting, necessary, p. 25.
what constitutes, p. 24.

Conspirators—

acts of, s. 10, p. 23.

Construction of documents—

acts of parties how far relevant, p. 20.

Consul—

certificate of British, s. 78, p. 157.

Contemporaneous agreement—

varying document, s. 99, p. 198.

Contemporaneous statements—

forming part of the same transaction, s. 6, p. 14.

Contents of documents—

how proved, s. 61, p. 138.

in what cases secondary evidence admissible, s. 63, p. 140.

relevancy of oral admissions as to, s. 22, p. 52.

Continuance—

presumption in favour of, s. 109, p. 208.

Contracts—

grants, or other dispositions of property, evidence of terms of s. 91, p. 169.

exclusion of evidence of oral agreement, s. 92, p. 178.

Contradiction—

of answers referring to credit, s. 155, Expln., p. 291.

testing veracity, s. 153, p. 287.

relevant facts, s. 158, p. 296.

witness by a writing, s. 145, p. 278.

Conversation—

statement forming part of, s. 39, p. 109.

Copies—

of foreign judicial records, presumption as to, s. 86, p. 163.

Copy—

of document, for refreshing memory, s. 159, p. 297.

private Act, presumption as to, s. 81, p. 161.

Corroboration—

of accomplice, s. 114, ill. (b), pp. 218, 223 ; s. 133, p. 262.

complaining in rape cases, p. 201.

evidence of relevant facts, s. 156, p. 293.

relevant facts, s. 158, p. 296.

testimony, by proof of former statements, s. 157, p. 293.

Corrupt inducement—

offered to witness, s. 155(2), p. 290.

Counsel—

admissions by, p. 45.

Counterpart—

documents executed in, s. 62, p. 139.

Course of business—

existence of, s. 16, p. 42.

facts showing statements made in, s. 32, pp. 84, 90.

Course of proceedings—

of Legislative Councils, judicial notice of, s. 57(4), p. 133.

Parliament, judicial notice of, s. 57(4), p. 133.

Court—

discretion of, as to order of witnesses, s. 135, p. 267.

meaning of, s. 3, p. 3.

proof of incompetency of, s. 44, p. 117.

to forbid indecent questions, s. 151, p. 286.

insulting questions, s. 152, p. 287.

what fact, takes judicial notice of, s. 57, p. 132.

questions may be put by, s. 165, p. 302.

Court-martial—

application of Act to judicial proceedings before a, s. 1, p. 2.

Coverture—

privilege of statements during, s. 122, p. 251.

Credit of witness—

contradictory evidence, use of, to attack, s. 153, p. 287.

cross-examination as to, s. 146, p. 282.

impeaching of, ways of, s. 155, p. 290.

proof of corroborative or contradictory evidence tending to impeach, s. 158, p. 296.

Criminating answer—

witness not excused from answering on ground of, s. 132, p. 261.

Cross-examination—

as to character, s. 146, p. 282.

previous written statements, s. 145, p. 278.

by a party of his own witnesses, s. 154, p. 288.

compulsion to answer questions, ss. 147, 148, p. 283.

leading questions allowed in, s. 143, p. 276.

meaning of, s. 137, p. 270.

must relate to relevant facts, s. 138, p. 270.

not allowed of a witness producing document, s. 139, p. 275.

confined to facts in examination-in-chief, s. 138, p. 270.

on new matters introduced in re-examination, s. 138, p. 270.

to discover status of witness, s. 146, p. 282.

shake credit by injuring character, s. 147, p. 283.

test veracity, s. 146, p. 282.

upon answer to judge's question, s. 165, p. 302.

writing with which memory is refreshed, s. 161, p. 299.

Crowd—

statements made by, s. 9, ill. (b), p. 22.

Crown—

bound by admission, p. 43.

Crown Representative—

acts of—how proved, s. 78, p. 157.

Custody of accused—

by police, confessions made during, s. 26, p. 63.

Custody of documents—

presumption as to, s. 90, p. 165.

Custom—

proof of, varying written contract, s. 92, proviso (5), pp. 178, 193.

relevancy of opinion as to existence of general, s. 48, p. 124.

statement as to the existence of, s. 32(4), pp. 84, 94.

what facts are deemed relevant in proving existence of, s. 13, p. 29.
is a, pp. 30, 125.

Customary incidents—

evidence to annex, s. 92, proviso (5), pp. 178, 193.

Damages—

character as affecting, s. 55, p. 130.

relevancy of facts in suits for, s. 12, p. 29.

Death—

dying declaration as to cause of, s. 32(1), pp. 84, 87.

presumption of, from seven years' absence, s. 108, p. 207.

statement by deceased as to cause of death, s. 21, p. 49 ; s. 32, p. 84.

Deceased person—

statements by, when relevant, s. 32, p. 84.

Deception—

confession caused by, s. 29, p. 73.

Declarations—

against interest, s. 21, p. 49.

Decree—

relevancy of, s. 40, p. 110.

Deed—

statements made in, s. 32(7), pp. 85, 98.

Defective document—

exclusion of evidence to explain, s. 93, p. 195.

Delay—

statement of persons who cannot be called without, s. 32, p. 84.

Diaries—

special, of police officers, s. 161, p. 299.

for refreshing memory, p. 299.

Diplomatic agent—

certified copies by s. 78, p. 157.

Discretion of Court—

as to order of witnesses, s. 135, p. 267.

Discovery of fact—

validates confession, s. 27, p. 65.

Disproved—

meaning of, s. 3, p. 10.

Document—

definitions of, s. 3, *ills.*, p. 6.

judge to order production of, s. 165, p. 302.

Documentary evidence—

exclusion of oral evidence by, ss. 91, 92, pp. 169, 178.

Document—

admissibility of, p. 13.

ambiguous, meaning of, s. 93, p. 195.

called for and examined, must be put in in evidence, s. 163, p. 301.

caricature is a, s. 3, *ill.*, p. 6.

certified copies of, s. 77, p. 157.

contents of, when proved, by oral evidence, s. 22, p. 52 ; s. 63(5), p. 140 ; s. 141, p. 277.

construction of, acts of parties, not to affect, p. 20.

executed in counterpart, s. 62, p. 139.

map is a, s. 3, *ill.*, p. 6.

meaning of, p. 6.

not proved by oral evidence, s. 60, p. 136.

presumptions as to, s. 73, p. 158.

primary evidence of, s. 62, p. 139.

private, s. 75, p. 157.

production of, certified copies of, s. 77, p. 157.

documents, s. 131, p. 260.

with objection, s. 162, p. 300.

title-deeds, s. 130, p. 260.

proof of, required by law to be attested, s. 68, p. 148 ; s. 70, 152.

proved by primary or secondary evidence, s. 61, p. 138 ; s. 64, p. 142.

public, s. 74, p. 155.

secondary evidence of, s. 65, p. 142 ; s. 66, p. 146.

statements made in, s. 32(7), pp. 85, 93.

thirty years' old, s. 90, p. 165.

Drunken person—

confession by, s. 29, p. 73.

Dumb witness—

mode of giving evidence by, s. 119, p. 249.

Dying declaration—

as to cause of death, s. 32(1), pp. 84, 87.

for refreshing memory, p. 298.

Enactments—

repeal of, s. 2, p. 3.

Entries—

- in books of account, when relevant, s. 34, p. 104.
- public or official books, s. 35, p. 106.

Estoppel—

- admissions may operate as, s. 31, p. 83.
- by attestation, p. 238.
 - election, p. 238.
 - recital in a deed, p. 237.
 - remaining silent, p. 237.
- constructive, p. 238.
- created by cheque, p. 238.
 - crediting cheque, p. 238.
- definition of, s. 115, p. 228.
- difference between, and presumption, p. 230.
 - and *res judicata*, p. 230.
 - and waiver, p. 231.
- equitable estoppel, p. 233.
- family arrangement, p. 239.
- feeding the, p. 239.
- fraudulent intention not necessary, p. 236.
- future promise does not create an, p. 235.
- in adoption, p. 241.
- kinds of, p. 231.
 - by deed, p. 231.
 - record p. 231.
 - in pais*, p. 232.
- must be unambiguous, p. 236.
- not affecting minors, p. 234.
 - against statutes, p. 237.
- of acceptor of bill of exchange, s. 117, p. 245.
 - bailee, s. 117, p. 246.
 - licensee, s. 116, p. 241 ; s. 117, p. 246.
 - mortgagees, pp. 240, 244.
 - tenants, s. 116, p. 241.
- on a point of law, p. 236.
- true facts known to both parties, p. 235.

Evidence—

- definition of, s. 3, p. 6.
- difference between, in civil and criminal proceedings, p. 9.
- of *res gestæ*, p. 14.

Examination-in-chief—

- leading questions not allowed in, s. 142, p. 276.
 - when allowed in, s. 142, p. 276.
- meaning of, s. 137, p. 270.
- must relate to relevant facts, s. 133, p. 270.

Exceptions—

- burden of proving, s. 105, p. 204.

Exchange—

bill of, estoppel of acceptor of, s. 117, p. 245.

Exclusion of evidence—

against application of document to existing facts, s. 94, p. 196.
of oral agreement varying terms of a contract, s. 91, p. 169.
to explain ambiguous defective document, s. 93, p. 195.

Existence—

of fact made probable to how relevancy, s. 11, p. 26.

Expert—

definition of, s. 45, p. 120.
experiments by, s. 51, ill., p. 127.
facts bearing on opinion of, s. 46, p. 122.
may give ground of opinion, s. 51, p. 127.
refresh memory by reference to professional treatises, s. 159, p. 297.
opinions, when relevant, s. 45, p. 120.
ascertained from books, s. 60, p. 136.

Explanatory facts—

relevancy of, s. 9, p. 22, s. 93, p. 195.

Fact—

burden of proof, as to particular, s. 103, p. 203.
definition of, s. 3, p. 4.
disproof of, s. 3, p. 10.
not proved, s. 3, p. 10.
proof of, s. 3, p. 8.
relevancy of, s. 3, p. 4.

Facts—

admitted, need not be proved, s. 53, p. 135.
bearing on opinion of experts, s. 45, p. 120.
burden of proof as to, s. 103, p. 203.
forming part of same transaction, s. 6, p. 14.
in issue, definition of, s. 3, p. 5.
evidence of, s. 5, p. 12.
judicially noticed, need not be proved, s. 56, p. 132.
necessary to explain or introduce relevant facts, s. 9, p. 22.
not requiring proof, pp. 132-135.
presumption as to existence of, s. 114, p. 218.
proof of, by oral evidence, s. 59, p. 136.
relevancy of, s. 3, p. 4.
which are occasion, cause or effect of relevant facts, s. 7, p. 15.

Family pedigree—

to show relationship, s. 32(6), pp. 85, 97.

Family portrait—

to show relationship, s. 32(6), pp. 85, 97.

Fasts—

judicial notice of, s. 57(9), p. 133.

Festivals—

judicial notice of, s. 57(9), p. 133.

- Fiduciary relation—**
burden of proof when parties stand in, s. 111, p. 212.
- Finger impressions—**
comparison of, with those admitted, s. 73, p. 154.
opinion of experts as to, s. 45, p. 120.
- First information report—**
evidentiary value of, p. 295.
- Flag—**
of foreign State, judicial notice of, s. 57(3), p. 133.
- Foreign country—**
public documents of, s. 78(6), p. 158.
- Foreign expressions—**
evidence to show meaning of, s. 98, p. 198.
judicial records, presumption as to certified copies of, s. 86, p. 163.
law, opinion of experts as to, s. 45, p. 120.
sovereigns and states, judicial notice of, s. 57(8), p. 133.
- Forfeiture—**
answer exposing witness to, s. 132, p. 267.
- Former proceedings—**
evidence given in, when admissible, s. 33, p. 99.
- Fraud—**
in obtaining judgment may be proved, s. 44, p. 117.
secreting original document, s. 66(3), p. 146.
invalidating a document, s. 92, proviso (1), pp. 178, 185.
- Gazette—**
presumption as to genuineness of, s. 81, p. 161.
statement made in, s. 37, p. 108.
- Genealogical table—**
how far evidence, s. 32(6), pp. 85, 97.
- General custom—**
or right defined, s. 48, Explan., p. 124.
- Geographical divisions—**
judicial notice of, s. 57(9), p. 133.
- Good faith—**
burden of proof as to, s. 111, p. 212.
relevancy of facts showing, s. 14, p. 34.
- Good will—**
facts showing existence of, s. 14, p. 34.
- Government—**
Acts, orders, notifications, proof of, s. 78, p. 157.
- Government Gazette—**
presumption as to genuineness of, s. 81, p. 161.

Grants—

and other dispositions of property, reduced to form of document, s. 91, p. 169.
varying the terms of, by oral evidence, s. 92, p. 178.

Grounds of opinion—

experts may give, s. 51, p. 127.

Guardian—

admissions by, p. 46.

Handwriting—

comparison of, s. 73, p. 154.
modes of proving, opinion of expert as to identity of, s. 45, p. 120.
of attesting witnesses, s. 69, p. 151.
proof of, when necessary, s. 67, p. 147.
relevancy of opinion as to, s. 47, p. 123.

Hearsay—

is no evidence, pp. 86, 137.
not admissible except in certain cases, p. 86.

High Court—

certain questions asked by attorney, etc., without reasonable grounds may
be reported to, s. 150, p. 286.

Holidays—

judicial notice of, s. 57(9), p. 133.

Horoscope—

how far evidence, p. 98.

Hostile witnesses—

cross-examination of, s. 154, p. 288.

Hostilities—

between British Government and other State, judicial notice of, s. 57(11), p. 132.

Husband and wife—

competent witnesses, s. 120, p. 249.
may not as witnesses disclose any communications made to each other during
marriage, s. 122, p. 251.

Identity—

facts establishing, of thing or person, s. 9, p. 22.
opinion of expert on, of hand-writing, s. 45, p. 120.
questions in cross-examination to discover, of witness, s. 146(2), p. 282.

Illegality—

invalidating a document, s. 92, proviso (1), pp. 178, 185.

Illegible characters—

evidence admissible to show meaning of, s. 98, p. 198.

Ill-will—

facts showing existence of, s. 14, p. 34.

Impartiality—

affecting credit of witnesses, s. 153, Excep. (2), p. 287.

- Impeaching credit—**
of witness, s. 155, p. 290.
- Improper admission—**
or rejection of evidence, s. 167, p. 305.
- Incapacity—**
to give evidence, s. 118, p. 246.
- Income-tax officers—**
statements of assessee before, p. 253.
- Incompetence—**
of Court to deliver judgment may be proved, s. 44, p. 117.
- Incompetent—**
what witnesses are, s. 118, p. 246.
- Inconsistency—**
of any fact in issue or relevant fact, s. 11, p. 26.
- Inconsistent statement—**
made by witness, s. 155(3), p. 290.
offered to a witness, s. 155(2), p. 290.
- Incriminating documents—**
witness cannot be compelled to produce, s. 130, p. 260.
- Incriminating statements—**
witness compelled to make, s. 132, p. 261.
- Indecent questions—**
Court to forbid, s. 151, p. 286.
- Independent States—**
recognition of, s. 57(8), p. 133.
- Inducement—**
confession caused by, s. 24, p. 54.
- Inscription—**
on stone or metal-plate is document, s. 3, ill., p. 6.
- Insolvency jurisdiction—**
relevancy of certain judgments in, s. 41, p. 111.
- Instances—**
proving right or custom, s. 13, p. 29.
- Insulting questions—**
Court to forbid, s. 152, p. 287.
- Intention—**
evidence as to declarations of, s. 15, p. 39.
of, to construe writing, p. 183.
facts showing, how far relevant, s. 14, p. 84.
- Interest—**
statement against, s. 32(3), pp. 84, 92.

Interpretation-clause—

s. 3, p. 3.

Interpreter—

communication made to, when disclosable, s. 127, p. 259.

Intimidation—

invalidating a document, s. 92, prov. (1), pp. 178, 185.

Intoxication—

confession made in, s. 29, p. 73.

Irrelevant—

evidence, rejection of, p. 5.

Issue of facts—

s. 3, p. 5.

Journals—

presumption as to, s. 81, p. 161.

Judge—

must decide on facts relevant and duly proved, s. 165, p. 302.

not compellable to answer certain questions, s. 121, p. 249.

to decide as to admissibility of evidence, s. 136, p. 268.

relevancy of fact, s. 136, p. 268.

forbid indecent question, s. 151, p. 286.

insulting question, s. 152, p. 287.

order production of document, s. 165, p. 302.

put any question, s. 165, p. 302.

Judgment—

fraud or collusion in obtaining or incompetency of Court to deliver, may be proved, s. 44, p. 117.

how far conclusive proof, s. 41, p. 111.

Judgments—

in rem, s. 41, p. 111.

must be based on facts relevant and duly proved, s. 165, p. 302.

not *inter partes*, how far transactions or particular instances, p. 32.

relevant, s. 43, p. 115.

when not conclusive proof, s. 42, p. 114.

when relevant, s. 40, p. 110.

Judicial notice—

facts of which Courts must take, ss. 56, 57, p. 132.

Judicial proceedings—

evidence in former, when relevant, presumption as to evidence in, s. 80, p. 159, meaning of, p. 3.

Jury—

questions to witnesses by, s. 166, p. 305.

Jus tertii—

may not be pleaded, when, p. 242.

Kafi—

register of marriages by a, admissible, p. 92.

Knowledge—

burden of proof, s. 106, p. 205.

facts showing, how far relevant, s. 14, p. 34.

that a witness is unworthy of credit, s. 155(1), p. 290.

Landlord and tenant—

burden of proof as to relationship of, s. 109, p. 208.

estoppel of tenant denying title of, s. 116, p. 241.

Language—

oral evidence to explain dubious, s. 97, p. 197.

Latent ambiguity—

evidence admitted to explain, p. 195.

Law—

judicial notice of, s. 57(1), p. 132.

Law books—

presumptions as to, s. 84, p. 162.

relevancy of statements, in, s. 38, p. 109.

Law, foreign—

opinion of experts as to, s. 45, p. 120.

Leading questions—

allowed in cross-examination, s. 143, p. 276.

Judge may put, s. 165, p. 302.

limit of rule with regard to, s. 142, p. 276.

meaning of, s. 141, p. 276.

not allowed in examination-in-chief, s. 142, p. 276.

re-examination, s. 142, p. 276.

when allowed in examination-in-chief, s. 142, p. 276.

Lease—

burden of proving discontinuance of, s. 109, p. 208.

Legal advisers—

rule as to disclosure of confidential communication to, s. 126, p. 256.

Legislative Councils—

course of proceeding of, judicial notice of, s. 57 (4), p. 133.

proceedings of, proof of, s. 78(4), p. 158.

Legitimacy—

birth during marriage conclusive proof of, s. 112, p. 214.

Letters—

contract contained in, s. 39, p. 109.

forming part of a transaction, s. 6, ill. (c), p. 14.

Lex fori—

law of evidence is, p. 3.

Licensee—

estoppel of, s. 116, p. 241 ; s. 117, p. 245.

Life—

presumption as to continuance of, s. 107, p. 206.

Lithograph—

a document, s. 3, p. 6.

Lithography—

document made by, s. 62, Explan. 2, p. 139.

Local expressions—

evidence to show meaning of, s. 98, p. 198.

London Gazette—

presumption as to genuineness of, s. 81, p. 161.

regulations, etc., contained in, proof of, s. 78(3), p. 158.

relevancy of statements in, s. 37, p. 103.

Lost document—

proof of contents of, s. 66(5), p. 146.

Lunatic—

when competent as witness, s. 118, Explan., p. 246.

Magistrate—

meaning of the term, s. 26, Explan., p. 63.

not compellable to answer certain questions, s. 121, p. 249.

disclose source of information as to commission of offence,
s. 125, p. 255.

Maps—

are "documents", s. 3, ill., p. 6.

presumption as to, s. 83, p. 162; s. 87, p. 164.

relevancy of statements in, s. 36, p. 108.

Marriage—

birth during conclusive proof of legitimacy, s. 112, p. 214.

husband and wife may not as witnesses disclose any communications made to
each other during, s. 122, p. 251.

statements as to existence of, s. 32(5), pp. 84, 95.

Matrimonial jurisdiction—

relevancy of certain judgments in, s. 41, p. 111.

Matters of State—

document produced by witness referring to, s. 162, p. 300.

Maxims—

allegans contraria non est audiendus, p. 229.

falsa demonstratio non nocet, p. 198.

omnia praesumuntur rite esse acta, pp. 42, 159.

qui tacet consentire videtur, p. 21.

res inter alios acta, p. 123.

"May presume"—

definition of, s. 4, p. 11.

Mechanical process—

copies made by, secondary evidence, s. 68, p. 140.

Memorandum of evidence—

- presumption as to, s. 80, p. 159.

Memory—

- right of adverse party to see writing used for refreshing, s. 161, p. 209.
- rules as to witness refreshing, s. 159, p. 297.

Minors—

- whether bound by estoppel, p. 234.

Mob—

- cries of, admissible in case of riot, s. 9, ill. (f), p. 22.

Motive—

- facts showing, s. 8, p. 16.

Mortgagee—

- estoppel of, pp. 239, 244.

Muhammadian—

- rules of evidence, repeal of, p. 217.

Mukhtears—

- professional communications to, p. 258.

Municipal body—

- proceedings of, s. 78(5), p. 158.

Native Prince—

- cession of territory to, s. 113, p. 218.

Negligence—

- facts showing existence of, s. 14, p. 34.

New matters—

- introduced in re-examination, s. 138, p. 270.

Newspaper—

- presumption as to genuineness of, s. 81, p. 161.

New trial—

- improper reception or rejection of evidence, when no ground for, s. 167, p. 305.

Notary public—

- seal of, judicially noticed, s. 78(6), p. 158.

Notice—

- to produce documents, rules as to, s. 66, p. 146.

Notifications in Official Gazette—

- judicial notice of, s. 57(7), p. 133.
- of cession of territory, s. 113, p. 218.
- Government, how proved, s. 78, p. 157.
- statement of fact in Government, s. 37, p. 108.

Not proved—

- when a fact is said to be, s. 3, p. 10.

Number of witnesses—

- no particular, necessary, s. 134, p. 267.

Obsolete expressions—

evidence to show meaning of, s. 98, p. 198.

Offence—

conspiracy to commit, s. 10, p. 23.

definition of, s. 30, Expln., p. 74.

Magistrate not compellable to disclose source of information as to commission of,
s. 125, p. 255.

Offensive questions—

Court to forbid needlessly, s. 152, p. 287.

Officers of Court—

name of, judicial notice of, s. 57(12), p. 133.

Official bodies—

acts of, are public documents, s. 74, p. 155.

Official books—

entries in, s. 35, p. 106.

Official communications—

public officer not compellable to disclose, s. 124, p. 253.

Official Gazette—

Notification in, s. 37, p. 108 ; s. 57(7), p. 133.

presumption as to, s. 81, p. 161.

Old age—

incompetency as a witness of a person of extreme, s. 118, p. 246.

Onus—

See BURDEN OF PROOF.

Opinion—

expert may give grounds of, s. 51, p. 127.

Opinions—

as to comparison of handwriting, s. 73, p. 154.

constitution of religious foundation, s. 49, p. 125.

existence of general custom or right, s. 48, p. 124.

handwriting, s. 47, p. 123.

meaning of particular words, s. 49, p. 125.

usages, tenets, meaning of terms, etc., s. 49, p. 125.

grounds of, are relevant, s. 51, p. 127.

of experts, facts bearing on, s. 46, p. 122.

on points of science or art, s. 45, p. 120.

third persons, when relevant, p. 124.

Oral admission—

as to contents of documents, s. 22, p. 52.

Oral agreement—

evidence of, not admissible to vary terms of a written contract, s. 92, p. 178.

Oral evidence—

definition of, s. 3(1), p. 6.

exclusion of, by documentary evidence, s. 92, p. 178.

Oral Evidence—Contd.

- must be direct, s. 60, p. 136.
- of contents of documents, s. 22, p. 52 ; s. 60, p. 136 ; s. 144, p. 277
- documents unmeaning in terms, s. 95, p. 196.
- experts when dispensed with, s. 60, p. 136.
- language used in documents, s. 96, p. 197.
- to explain ambiguous documents, s. 93, p. 195.

Order—

- of examination of witnesses, s. 138, p. 270.
- production of witnesses, s. 135, p. 267.
- relevancy of, s. 40, p. 110.

Orders of Government, etc.—

- how proved, s. 78, p. 157.

Originals—

- more than one proof of, s. 91, Expln., 2, pp. 170, 173.

Ownership—

- burden of proof as to, s. 110, p. 209.

Panchanama—

- proof of, p. 7.

Pardanashin ladies—

- burden of proof of documents of, p. 213.

Parliament—

- Acts passed by, judicial notice of, s. 57(2), p. 132.
- course of proceeding of, judicial notice of, s. 57(4), p. 133.
- meaning of, s. 57(4), Expln., p. 133.

Parol evidence—

- See ORAL EVIDENCE.

Partners—

- admissions by, p. 46.
- burden of proof as to relationship in case of, s. 102, p. 208.

Party to a suit—

- admission by a, s. 18, p. 44.
- notice to, to produce documents, s. 66, p. 146.

Pedigree—

- how far evidence, p. 98.
- statement in family, s. 32(6), pp. 85, 97.

Person in authority—

- confession made to a, s. 24, p. 54.

Photograph—

- a document, s. 3, ill., p. 6.

Plans—

- are 'documents', s. 3, ill., p. 6.
- presumption as to, s. 83, p. 162.
- relevancy of statements in, s. 36, p. 103.

Pleaders—

- admissions of fact by, p. 45.
- confidential communications to, s. 126, p. 256.
- insulting questions put by, s. 150, p. 286.
- names of, judicial notice of, s. 57(12), p. 133.
- notice to, to produce documents, s. 66, p. 146.

Police-officers—

- confession by accused while in custody of, s. 26, p. 63.
- to, s. 25, p. 60.
- diary of, for refreshing memory, p. 298.
- not compellable to disclose source of information as to commission of offence, s. 125, p. 255.

Political Agents—

- certificate of, presumption as to, s. 86, p. 163.

Portrait—

- statement made on family, s. 32(6), pp. 85, 97.

Position in life—

- cross-examination as to, s. 147, p. 283.

Possession—

- denoting ownership, s. 110, p. 209.

Post-mortem examination—

- reports, for refreshing memory, p. 298.

Powers-of-attorney—

- presumption as to, s. 85, p. 163.

Prejudice—

- communications, without, s. 23, p. 53.

Preparation—

- facts showing, s. 8, p. 16.

Presumption—

- as to accomplice evidence, s. 114, ill. (b), pp. 218, 223.
- bills of exchange, s. 114, ill. (c), pp. 218, 224.
- books of law and reports, s. 84, p. 162.
- certified copies, s. 79, p. 158.
- of foreign judicial records, s. 86, p. 163.
- documents, s. 79, p. 153.
- admissible in England, s. 82, p. 162.
- due execution of, s. 89, p. 164.
- produced as record of evidence, s. 80, p. 159.
- thirty years' old, s. 90, p. 165.
- existence of certain facts, s. 114, p. 218.
- gazettes, etc., s. 81, p. 161.
- maps and charts, s. 87, p. 164.
- or plans, s. 83, p. 162.
- powers-of-attorney, s. 85, p. 163.
- recent possession of stolen property, s. 114, ill. (a), pp. 218, 221.
- telegraphic message, s. 88, p. 164.

Presumption—Contd.

- conclusive, p. 11.
- definition of, p. 11.
- of fact, p. 11.
- law, p. 11.

Previous conviction—

- how far a relevant fact, s. 14, p. 34.
- evidence of bad character, s. 54, p. 129.
- when given s. 153, exception 1, p. 287.

Primary evidence—

- meaning of, s. 62, p. 139.
- proof of document by, s. 61, p. 138 ; s. 64, p. 142.

Principal and agent—

- burden of proof as to relationship in case of, s. 109, p. 208.

Principal and surety—

- admission by, p. 46.

Privilege—

- communications during marriage, s. 122, p. 251.
- information as to commission of offences, s. 125, p. 255.
- judges and magistrates, s. 121, p. 249.
- not waived by volunteering evidence, s. 128, p. 259.
- of affairs of State, s. 123, p. 252.
- clients, s. 129, p. 259.
- official communications, s. 124, p. 253.
- professional communications, s. 126, p. 256.

Privileged communications—

- rules as to, s. 126, p. 256.

Private documents—

- public records of, are public documents, s. 74, p. 155.
- what are, s. 75, p. 157.

Privi Council—

- orders, etc., issued by, proof of, s. 78(3), p. 157.

Probability—

- facts showing, of fact in issue, s. 11, p. 26.

Probate—

- in proof of will, s. 91, exception 2, pp. 170, 173.

Probate jurisdiction—

- relevancy of certain judgments in, s. 41, p. 111.

Proceedings—

- evidence given in former, when relevant, s. 33, p. 99.

Proclamations—

- how proved, s. 78, p. 157.

Proctors—

- names of, judicial notice of, s. 57(12), p. 133.

Production—

- of documents, by agent, s. 131, p. 260.
 - called for and examined, s. 163, p. 301.
 - once refused, s. 164, p. 302.
 - under protest, s. 162, p. 300.
- title-deeds, by witness, s. 130, p. 260.
- witnesses, s. 135, p. 267.
- writing used by witness to refresh memory, s. 161, p. 299.

Professional communications—

- rules as to, s. 126, p. 256.

Professional treatise—

- expert may refresh memory by reference to, s. 159, p. 297.

Promise—

- confession caused by, s. 24, p. 54.
- of secrecy, does not vitiate confessions, s. 29, p. 73.

Proof—

- admission not conclusive, s. 31, p. 83.
- birth during marriage conclusive, of legitimacy, s. 112, p. 214.
- burden of. See BURDEN OF PROOF.
- conclusive, meaning of, s. 4, p. 11.
- facts not requiring, chap. III, p. 132.
- of acts, orders, notifications of Government, s. 78, p. 157.
 - of the Executive, s. 78(4), p. 158.
- admission against person making it, s. 21, p. 49.
 - by or on behalf of person making it, s. 21, p. 49.
- admitted fact not necessary, s. 85, p. 135.
- attested documents not required by law to be attested, s. 72, p. 153.
- certain public and official documents, s. 74, p. 155.
- contents of documents, s. 61, p. 138 ; s. 64, p. 142.
- execution of document required by law to be attested, s. 68, p. 148 ; s. 70, p. 152.
 - when attesting witness cannot be found, s. 69, p. 151.
 - denies execution, s. 71, p. 153.
- facts by oral evidence, s. 59, p. 136.
- handwriting and signature when necessary, s. 67, p. 147.
- proceedings of Legislatures, s. 78(2), p. 157.
 - municipal body, s. 78(5), p. 158.
- proclamation, etc., of Government, s. 78(3), p. 157.
- public document by production of certified copy, s. 77, p. 157.
 - of foreign country, s. 78(6), p. 156.
- statement, how much necessary, s. 39, p. 109.
- will by probate, s. 91, exception 2, p. 170.

Proper custody—

- what is, s. 90, Explanation, p. 165.

Prosecutrix—

- proof of immoral character of, s. 155(4), p. 290.

Proved—

when a fact is said to be, s. 3, p. 8.

Provincial expressions—

evidence to show meaning of, s. 98, p. 198.

Public book—

interest, statements as to matters of, s. 32(4), pp. 84, 94.

register, or record, entry in, s. 35, p. 106.

right, statements as to, s. 32(4), pp. 84, 94.

Public document—

certified copies, s. 76, p. 157.

enumeration of, s. 74, p. 155.

Public festivals—

judicial notice of, s. 57(9), p. 133.

Public nature—

judgments referring to, relevant, s. 42, p. 114.

Public office—

accession, etc., to, judicial notice of, s. 57(7), p. 133.

Public officers—

acts or records of facts of, are public documents, s. 74, p. 155.

Public proceedings—

of Legislative Councils, proof of, s. 78(2), p. 157.

Public proclamations—

of Government, proof of, s. 78(3), p. 157.

Public records—

entries in, s. 35, p. 106.

of private documents, s. 74, p. 155.

Public servant—

entries made by, s. 35, p. 106.

Questions—

asked without reasonable grounds, s. 150, p. 286.

as to credit, s. 155, p. 290.

by party to his own witness, s. 154, p. 288.

indecent or scandalous, s. 151, p. 286.

intended to insult or annoy, s. 152, p. 287.

judge may ask any, s. 165, p. 302.

jury or assessors may ask, s. 166, p. 305.

lawful in cross-examination, s. 143, p. 276.

leading, s. 141, p. 276.

witness must answer, though criminating, s. 132, p. 261.

Rape—

impeaching credit of prosecutrix for, s. 155(4), p. 290.

Rashness—

facts showing existence of, s. 14, p. 34.

Recitals—

in Acts or notifications, s. 57(6), p. 133.
instruments, s. 32(7), pp. 85, 98.

Record of evidence—

foreign judicial, presumption as to, s. 86, p. 163.
presumption as to documents purporting to be, s. 80, p. 159.
relevancy of entry in a, made in performance of duty, s. 35, p. 106.

Re-examination—

as to character, s. 140, p. 276.
leading questions not allowed in, s. 142, p. 276.
meaning of, s. 137, p. 270.
on new matter introduced by permission of Court, s. 138, p. 270.
to what directed, s. 138, p. 270.

Reference—

to books by experts, s. 159, p. 297.

Refreshing memory—

right of adverse party to see writing used for, s. 161, p. 299.
rules as to, s. 159, p. 297.
special diary for, s. 159, p. 298.
want of stamp, s. 159, p. 298.

Refusal—

secondary evidence on, s. 65, p. 142.
to produce document, presumption on, s. 89, p. 164.

Register—

entry in a, s. 35, p. 106.

Regulations of Government—

proof of, s. 73(3), p. 157.

Rejection—

improper, of evidence no ground for new trial, s. 167, p. 305.
of evidence as irrelevant, p. 5.

Relationship—

burden of proof as to, s. 111, p. 212.
made in wills, s. 32(4), pp. 85, 97.
relevancy of opinion as to, s. 50, p. 126.
statement as to existence of, s. 32(5), pp. 84, 95.

Relevancy—

of admission in civil cases*, s. 17, p. 43.
had character in criminal proceedings, s. 54, p. 129.
character as affecting damages, s. 55, p. 130.
conduct, in civil cases, s. 52, p. 127.
criminal cases, s. 53, p. 128.
confession made after removal of impression caused by inducement, threat,
or promise, s. 28, p. 72.
corroboration of facts, s. 156, p. 293.
entry in public record, etc., made in performance of duty, s. 35, p. 106.

Relevancy—Contd.**of facts—**

bearing on opinions of experts, s. 46, p. 122.

questions whether act was accidental or intentional, s. 15, p. 39

forming part of the same transaction, s. 6, p. 14.

in suits for damages, s. 12, p. 29.

inconsistent with fact in issue or relevant fact, s. 11, p. 26.

necessary to explain or introduce a fact in issue or relevant fact, s. 9, p. 22.

of good character in criminal proceeding, s. 54, p. 129.

showing existence of course of business, s. 16, p. 42.

state of mind, body, or bodily feeling, s. 14, p. 34.

where right or custom in question, s. 13, p. 29.

which are the occasion, etc., of relevant facts or facts in issue, s. 7, p. 15.

which show a motive or preparation for any fact in issue or relevant fact, s. 8, p. 16.

grounds of opinion, s. 51, p. 127.

judgments, etc., to bar second suit or trial, in probate, etc., jurisdiction, s. 41, p. 111.

in other than probate, etc., jurisdiction, s. 42, p. 114.

judgments, in probate, etc., conclusive proof, s. 41, p. 111.

judgments, etc., other than above, s. 43, p. 115.

opinions as to existence of general custom or right, s. 48, p. 124.

handwriting, s. 47, p. 123.

relationship, s. 50, p. 126.

usages, tenets, etc., s. 49, p. 125.

oral admission as to contents of documents, s. 60, p. 136.

previous conviction in criminal proceedings, s. 14, p. 34.

reports, s. 38, p. 109.

statements as to fact of public nature contained in certain Acts or notifications, s. 37, p. 108.

in maps, charts, and plans, s. 36, p. 108.

of act of conspirator, s. 10, p. 23.

law of country contained in law-books, s. 38, p. 109.

Relevant—

definition of, s. 3, p. 4.

Repeal—

of enactments, p. 4.

Reports—

of decisions, presumption as to genuineness of, s. 84, p. 162.

relevancy of, s. 38, p. 109.

Reputation—

evidence of general, s. 55, Explanation, p. 130.

Res gestae—

evidence of, p. 14.

Res judicata—

s. 40, p. 110.

Retracted confession—

s. 30, p. 80.

Revenue officer—

meaning of, s. 125, Explanation, p. 255.

not compelled to give source of information, s. 125, p. 255.

Right—

opinion as to existence of general, s. 48, p. 124.

relevancy of facts as to existence of, s. 13, p. 29.

term imports corporeal and incorporeal right, p. 30.

Road—

rule of the, judicially noticed, s. 57(13), p. 133, 134.

Rule—

as to notice to produce documents, s. 66, p. 146.

of the road or sea, judicially noticed, s. 57(13), pp. 133, 134.

Samadaskat book—

entries of payment in, p. 92.

Scandalous questions—

when Court to forbid, s. 151, p. 286.

Science—

opinions of experts on points of, s. 45, p. 120.

Sea—

judicial notice of the rule of the road, or, s. 57(13), p. 133, 134.

Seal—

comparison of, with admitted or proved, s. 73, p. 154.

presumption as to genuineness of, s. 82, p. 162.

Seals—

list of, judicially noticed, s. 57(6), p. 133.

Secondary evidence—

after notice to produce, s. 66, p. 146.

certified copies, s. 76, p. 157.

meaning of, s. 63, p. 140.

of ancient documents, p. 167.

existence, condition, or contents of documents, s. 65, p. 142.

Secrecy—

confession under promise of, s. 29, p. 73.

Series—

of occurrences, relevancy of, s. 15, p. 39.

Seven years'—

absence, presumption of death from, s. 108, p. 207.

Shall presume—

defined, s. 4, p. 11.

Sign Manual—

of Sovereign, judicial notice of, s. 57(5), p. 133.

Signature—

- comparison of, with admitted or proved, s. 73, p. 154.
- presumption as to genuineness, of, s. 79, p. 158.
- proof of, when necessary, s. 67, p. 147.
- not necessary, s. 82, p. 162.

Sovereign—

- accession of, judicial notice of, s. 57(5), p. 133.
- acts or records of acts of, s. 74, p. 155.

Special diary—

- of police-officers, s. 145, p. 280 ; s. 159, p. 298.

Stamp—

- of a document, presumption as to, s. 89, p. 164.
- want of, refreshing memory, s. 159, p. 297.

State—

- affairs of, admissibility of evidence as to, s. 123, p. 252.

State of body—

- admissions as to, s. 21, p. 49.
- facts showing existence of, s. 14, p. 34.

State of mind—

- admissions as to, s. 21, p. 49.
- facts showing existence of, s. 14, p. 34.

Statements—

- against interest of maker, s. 21, p. 49 ; s. 32(3), pp. 84, 92.
- by party to proceeding or agent, s. 18, p. 44.
- interested in the subject-matter of suit, s. 18, p. 44.
- persons who cannot be called as witnesses, s. 32, p. 84 ; s. 33, p. 99.
- how much of, should be proved, s. 39, p. 109.
- made in course of business, s. 32(2), pp. 84, 90.
- presumption as to evidence, s. 80, p. 159.
- regarding conduct, s. 8, Expln., 2, pp. 16, 21.
- relating to cause of death, s. 21, p. 49 ; s. 32(1), pp. 84, 90.
- relevancy of, as to facts of public nature, s. 32(4), pp. 84, 94.
- in maps, charts, etc., s. 36, p. 108.

Status of witness—

- cross-examination as to, s. 146, p. 282.

Strangers—

- admissions by, when relevant, s. 19, p. 47 ; s. 20, p. 48.

Suitor—

- admission by, s. 18, p. 44.

Surety—

- admissions by, p. 46.

Technical expression—

- evidence to show meaning of, s. 98, p. 198.

Telegraph messages—

- presumption as to, s. 88, p. 164.

Tenant—

burden of proof as to relationship of, s. 109, p. 208.
estoppel of, denying title of landlord, s. 116, p. 241.

Tender years—

incompetency as witness of person of, s. 118, p. 246.

Tenets—

of body of men or family, relevancy of opinion as to, s. 49, p. 125.

Terms—

relevancy of opinion as to meaning of, s. 49, p. 125.

Territories—

British, judicial notice of, s. 57(10), p. 133.

Territory—

cession of, conclusive proof of, s. 113, p. 218.

Testify—

who are competent to, s. 118, p. 246.

Thirty years—

old documents, s. 90, p. 165.
presumption as to death, s. 107, p. 206,

Threat—

confession caused by, s. 24, p. 54.
removal of the effect of, s. 28, p. 72.

Time—

judicial notice of, s. 57(9), p. 133.

Title deeds—

of a witness not a party, production of, s. 130, p. 260.

Tombstone—

statement as to relationship made on, s. 32(6), p. 85, 97.

Transaction—

facts forming part of the same, s. 6, p. 14.
proving right or custom, s. 13, p. 29.
the import of, p. 31.

Translation—

of documents produced by a witness, s. 162, p. 300.

Unintelligible terms—

evidence to explain meaning of, s. 93, p. 198.

Usage—

proof of, as varying written contract, s. 92, proviso (5), pp. 173, 193.

Usages—

of body of men, of family, relevancy of opinion as to, s. 49, p. 125.

Vakil—

communication to, privilege of, s. 126, p. 256.
name of, judicial notice of, s. 57(12), p. 133.
questions asked by, without reasonable grounds, s. 150, p. 286.

Varying of document—

- by contemporaneous agreement, s. 90, p. 165.
- oral evidence, s. 92, p. 178.

Veracity of witness—

- questions to test, s. 146, p. 282.

Volunteering evidence

- effect of, s. 128, p. 259.

War—

- articles of, judicial notice of, s. 57(3), p. 132.

Warning—

- confession not invalidated by absence of, s. 29, p. 73.

Wife—

- See HUSBAND AND WIFE.

Wills—

- construction of, not affected, s. 100, p. 199.
- proof of, by probate, s. 91, exception 2, pp. 170, 178.
- statement as to custom made in, s. 32(7), pp. 85, 98.
- relationship made in, s. 32(6), pp. 85, 97.

Without prejudice

- statements made, s. 23, p. 53.

Witness—

- accomplice competent, against accused person, s. 114, ill. (b), p. 218; s. 123, p. 262.
- attesting, proof when he cannot be found, s. 69, p. 151.
- attorney as, s. 126, p. 256.
- attorney's clerk or servant as, s. 127, p. 259.
- barrister as, s. 126, p. 256.
- barrister's clerk or servant as, s. 127, p. 259.
- client as, s. 129, p. 259.
- compelled to produce title-deeds, s. 130, p. 260.
 - incriminating documents, s. 130, p. 260.
 - documents of others, s. 131, p. 260.
 - make criminating statements, s. 132, p. 261.
- competency of, s. 118, p. 246.
- contradiction of, s. 153, p. 287.
- credit of, confirmation of, s. 158, p. 296.
 - how impeached, s. 155, p. 290.
 - impeachment of, s. 153, p. 287.
 - questions in cross-examination affecting, s. 146, p. 282.
- cross-examination. See CROSS-EXAMINATION.
- dumb, mode of giving evidence by, s. 119, p. 249.
- evidence of, when relevant for proving in subsequent proceeding truth of facts stated, s. 33, p. 99.
- examination of, as to witness, document or contents, s. 22, p. 52.
- examination-in-chief of. See EXAMINATION-IN-CHIEF.
- husband or wife of accused competent as, in criminal proceedings, s. 120, p. 249.
- interpreter as, s. 127, p. 259.

Witness—Contd.

judge or magistrate as, s. 121, p. 249.
 may be cross-examined upon it, s. 161, p. 299.
 not a party, rules as to production of title-deeds of, s. 130, p. 260.
 excused from answering on ground that answer would criminate, s. 132, p. 261.
 of document executed in the United Kingdom, s. 69, p. 151.
 oral evidence of, as to statements, by other persons of contents of documents
 when admissible, s. 60, p. 136.
 order of examination of, s. 135, p. 267.
 party to civil suit, and husband or wife competent, s. 120, p. 249.
 pleader as, s. 126, p. 256.
 pleader's clerk or servant as, s. 127, p. 259.
 power of Judge to examine, s. 165, p. 302.
 production of document by, s. 130, p. 260 ; s. 139, p. 275.
 proof of former statement of, to corroborate testimony, s. 157, p. 293.
 public officer as, s. 123, p. 252.
 questions to, by jury or assessors, s. 166, p. 305.
 re-examination of. *See* RE-EXAMINATION.
 refreshing memory by reference to writing, s. 159, p. 297.
 statements by persons who cannot be called as, s. 32, p. 84.
 to character, cross-examination and re-examination of, s. 140, p. 276.
 translation of document produced by, s. 162, p. 300.
 vakil as, s. 126, p. 256.
 vakil's clerk or servant as, s. 127, p. 259.
 when compellable to answer question in cross-examination testing veracity
 etc., s. 147, p. 283.
 in what case Court to decide, s. 148, p. 283.
 may testify to facts mentioned in document, s. 114, p. 218.
 execution of document must be proved by, s. 68, p. 148.
 wife of accused, competent, in criminal proceedings, s. 120, p. 249.

Witnesses—

dumb persons as, s. 19, p. 249.
 examination of, s. 135, p. 267.
 no particular number of, necessary 'o prove fact, s. 134, p. 267.
 order of production and examination of, s. 135, p. 267 ; s. 138, p. 270.
 what persons competent, s. 118, p. 246.

Writing—

comparison of, with admitted or proved writing, s. 73, p. 154.
 dumb witness may give evidence by, s. 119, p. 249.
 is a "document", s. 3, ill., p. 6.
 to refresh witness's memory, adverse party entitled to production of, and may
 cross-examine upon, s. 161, p. 299.
 when witness may refresh memory by reference to, s. 159, p. 297.

Words—

meaning of particular, s. 49, p. 125.
 printed, etc., are documents, s. 3, ill., p. 6.
 used in a peculiar sense, evidence as to, s. 98, p. 198.

